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No. 96952-3

SUPREME COURT
OF THE STATE OF WASHINGTON

ROLFE GODFREY and KRISTINE GODFREY, husband
and wife and their marital community composed thereof,

Plaintiffs/Respondents,

v.

STE. MICHELLE WINE ESTATES, LTD. dba
CHATEAU STE. MICHELLE, a Washington Corporation;
and SAINT-GOBAIN CONTAINERS, INC.,

Defendants/Petitioners,

and

ROBERT KORNFELD,

Additional Appellant.

SUPPLEMENTAL BRIEF OF PETITIONERS

Emily J. Harris, WSBA No. 35763
Kelly H. Sheridan, WSBA No. 44746
CORR CRONIN LLP
1001 Fourth Avenue, Suite 3900
Seattle WA 98154-1051
Telephone: (206) 625-8600
Facsimile (206) 625-0900

Michael B. King, WSBA No. 14405
Gregory M. Miller, WSBA No. 14459
CARNEY BADLEY SPELLMAN, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010
Telephone: (206) 622-8020
Facsimile: (206) 467-8215

*Attorneys for Petitioners Ste. Michelle Wine Estates Ltd.
and Saint-Gobain Containers, Inc.*

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I. SUPPLEMENTAL STATEMENT OF THE CASE

A. Facts pertaining to the affidavit of prejudice issue raised in the petition for review.

On February 13, 2010, Plaintiff Rolfe Godfrey (the Respondent before this Court) suffered a laceration of his left thumb when a bottle of Chateau Ste. Michelle wine he was opening broke in his hand. CP 690. At the time of his injury, Godfrey was working as a bartender at an Olive Garden restaurant in Tacoma. RP 1109. On September 20, 2012, Godfrey filed a complaint for personal injuries against Chateau Ste. Michelle and Saint-Gobain Wine Containers (the Petitioners before this Court), in Pierce County Superior Court. CP 1-8.

On December 19, 2013, the case was reassigned to the Honorable Katherine Stolz. CP 157. On January 6, 2014, Judge Stolz granted a stipulated motion and entered an order (1) extending the disclosure deadline for Petitioners' witnesses, (2) establishing a separate deadline to disclose Petitioners' expert opinions, (3) extending the rebuttal witness disclosure deadline, and (4) excepting the disclosure of Petitioners' examining physician report from the disclosure deadlines. CP 158-59.¹

On March 3, 2014, after moving to continue the trial date for a second time, Godfrey filed an affidavit of prejudice² and related motion for

¹ The original deadlines had been established by a case scheduling order, and the Pierce County Local Rules provide that a trial court may delay compliance with such deadlines only for good cause. PCLR 3(e).

² RCW 4.12.050 was amended in 2017 and no longer requires the party seeking disqualification to file an affidavit stating that the assigned judge is prejudiced against such party. Laws of 2017, ch. 42, § 2. But the prior version of the statute governed the trial court's decision on Mr. Godfrey's affidavit of prejudice, and also governs Mr. Godfrey's

reassignment under RCW 4.12.050. CP 791-94. On March 7, 2014, after hearing argument, the trial court denied Mr. Godfrey's motion, finding that the order entered on January 6 was discretionary within the meaning of the statute. CP 205-06.³ On March 21, after hearing further argument, the trial court denied Godfrey's motion for reconsideration of that ruling. CP 244-45. The trial court amended the case schedule that same day, setting May 12, 2014, as the deadline for the exchange of witness and exhibit lists; setting August 29, 2014, as the deadline for the parties' Joint Statement of Evidence; and modifying the date for trial to commence, from July 7 to September 29, 2014. CP 246.

B. Facts pertaining to Godfrey's attempt to revive his challenge to the trial court's sanctions order.

On July 10, 2014, the trial court entered a pretrial order that (in relevant part) directed the parties to abide by the case schedule deadline for the submission of the Joint Statement of Evidence. CP 462, 464. On August 22 the trial court granted a summary judgment dismissal of Godfrey's design defect, breach of warranty, and failure-to-warn claims, while

appeal. *See State v. Lile*, 188 Wn.2d 766, 775 n.5, 398 P.3d 1052 (2017) (concluding that the 2017 amendment is not retroactive). Petitioners therefore will use the pre-2017 "affidavit of prejudice" nomenclature.

³ During the argument, counsel for Godfrey agreed that if the order had not been based on a stipulation of the parties, "I would agree with Your Honor that there would have been a discretionary ruling." CP 219 (Hearing Transcript March 7, 2014 at 4:23-5:2). The trial court also found a stipulated order entered on January 7 by a Superior Court Commissioner, requiring Godfrey to undergo a CR 35 examination, to have been discretionary. Petitioners are not relying on that order in this proceeding.

denying summary judgment on Godfrey’s manufacturing defect claim. CP 689-90.⁴

On August 25, Godfrey provided Petitioners with witness and exhibit lists. CP 483, 488. Godfrey’s exhibit list included three exhibits—numbers 13, 14, and 15—collectively comprising over 11,000 pages of documents: (1) Exhibit 13, consisting of all of the documents produced during discovery by Ste. Michelle (7,831 pages); (2) Exhibit 14, consisting of all of the documents produced during discovery by Saint-Gobain (1,226 pages); and (3) Exhibit 15, consisting of all of the documents produced by Godfrey’s employer, Darden Restaurants (2,599 pages). CP 339. On August 26, Godfrey provided the format of the Joint Statement of Evidence, with the same exhibits. CP 490.

The Joint Statement of Evidence was due on August 29. CP 246. That morning Petitioners’ counsel emailed Godfrey’s counsel the Petitioners’ portion of the joint statement, including objections to Godfrey’s exhibits. CP 316-18, 446, 452-53.⁵ Godfrey did not provide his objections to Petitioners’ exhibits, nor did he file the joint statement. CR 446-47, 452.⁶ Petitioners then filed their portion of the joint statement. CP 314, 446-47, 494.

⁴ Godfrey did not appeal from the dismissal of any of these claims.

⁵ For each of the document production exhibits—Exhibits 13, 14, and 15—Petitioners objected that designating entire document productions resulted in exhibits that “improperly contain ... hundreds of distinct documents.” *See* CP 316-18 (objections to Exhibits 13, 14, and 15).

⁶ It is undisputed that, under the operative orders of the trial court and the Piece County Local Rules, it was Godfrey’s responsibility, as the plaintiff, to file the joint statement on behalf of himself and Petitioners.

On September 12, Petitioners filed their trial brief, raising the issue of sanctions. CP 425-26. On September 26, the Friday before trial, Petitioners moved for sanctions; Godfrey *still* had not submitted the Joint Statement of Evidence or provided objections to Petitioners' exhibits, and Petitioners requested that Godfrey not be allowed to introduce into evidence any document to which Petitioners had objected—including Exhibits 13, 14, and 15. CP 437-42.

The trial court heard argument on Petitioners' motion on the first day of trial, and granted it. RP 77-86. The trial court emphasized that the purpose of the joint statement of evidence is not merely a formality or an index; its purpose is to pare down witnesses, exhibits and objections before trial so that trial is not reduced to a "guessing game." RP 84, 85, 162-63.⁷ Godfrey filed the joint statement the next day, continuing to identify all of the documents produced in discovery by Ste. Michelle, Saint-Gobain, and Darden Restaurants as Exhibits 13, 14, and 15. CR 527, 529-31

Godfrey's manufacturing defect claim was tried to the bench. The court heard testimony from 12 witnesses called by Godfrey and four witnesses called by Petitioners, and admitted 43 exhibits proffered by Godfrey and 35 proffered by Petitioners. CP 698-702. Godfrey presented testimony from two liability experts, William Hamlin and Eric Heiberg. CP 698. Godfrey included copies of his Exhibits 13, 14, and 15—the exhibits

⁷ The trial court later entered a written order memorializing its sanctions ruling. CP 587-88. Petitioners do not dispute that the trial court did not include an on-the-record balancing of the factors set forth in this Court's decision in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997).

containing the entirety of the Ste. Michelle, Saint-Gobain, and Darden Restaurants document productions—in the trial exhibit binders present in the courtroom, but did not offer those exhibits or any portion of those exhibits. CP 598. The trial exhibit binders also included two exhibits purporting to summarize alleged “other similar incidence [sic]” and work order documents produced by Ste. Michelle during discovery, but Godfrey did not offer those exhibits. CP 599.

One week after trial concluded, Judge Stolz ruled in Petitioners’ favor. RP 1660-69. Petitioners then prepared written Findings of Fact and Conclusions of Law, and Godfrey filed objections. CP 614-19. Judge Stoltz modified Petitioners’ proposed findings and conclusions, then signed and entered them on November 7, 2014. CP 688-697 (copy attached as App. A to this brief). In her findings, Judge Stoltz first stated that “[t]he central disputed issue at trial was what caused the incident bottle to break”:

Plaintiff argued that the bottle was manufactured out of specification for perpendicularity (or "lean"), which caused it to be damaged during the bottling process, and that this damage later caused the bottle to break while it was being opened by Mr. Godfrey. Defendants argued that the bottle broke because of contact damage from the corkscrew Mr. Godfrey was using when he attempted to open the bottle.

CP 690 (FOF No. 5). Judge Stoltz then observed that Godfrey had tried to meet his burden of proof on this issue through the testimony of his two expert witnesses, Hamlin and Heiberg. *Id.* (FOF No. 6).

Judge Stoltz found that Hamlin’s testimony shed no light on the issue. CP 691 (FOF No. 6). That left Heiberg, and Judge Stoltz found his testimony unpersuasive for four reasons:

The Court does not find Mr. Heiberg's opinion persuasive. *First*, there was persuasive evidence at trial that significant differences exist between flat glass (Mr. Heiberg's area of prior experience) and container glass (the specialty of defense expert Rick Bayer, ...), including the types of stresses that act upon flat and container glasses. *Second*, Mr. Heiberg's measurement methodology of the incident bottle was not reliable because he did not use accepted industry standards to measure the bottle; instead he measured the bottle while it rested on a wooden conference table, rather than placing it upon a machine-ground metal plate (which was the method employed by Mr. Bayer, who derived different measurements). *Third*, the Court finds persuasive the testimony by defense experts that, even if Mr. Heiberg's underlying measurements were correct, his perpendicularity calculations combining the effects of "out of round" and "rocker bottom" would only be justified in the unlikely event that those two conditions lined up exactly -- i.e., that the incident bottle was out of round and had a rocker bottom that each caused it to lean in the exact same direction and that it was equally likely that two such conditions would cancel each other. *Fourth*, the Court also finds persuasive the testimony of defense experts that a small crack or other defect in the top of the incident bottle that weakened the glass would not have withstood the stress exerted by the cork once it was inserted into the bottle, and that the bottle under Plaintiff's theory, would therefore have broken long before it reached Mr. Godfrey.

CP 691-92 (FOF No. 8) (emphasis added).

Following the entry of a final judgment on December 1, 2014, CP 765-66), Godfrey appealed. Godfrey did not assign error to any specific finding of fact, only to the entry of the findings of fact and conclusions of law. *See* Brief of Appellants at 3 (Assignment of Error No. 5). Godfrey did not state an issue challenging any of the trial court's findings of fact, and also did not present any argument challenging any of those findings.

Godfrey challenged only the trial court's denial of the motion for reassignment, and the trial court's sanctions order.⁸

Division Two reversed, holding that the trial court erred in denying Godfrey's motion for reassignment under RCW 4.12.050. *See* 195 Wn. App. 1007, 2016 WL 3944869, at *2-3 (July 19, 2016). Division Two did not reach the sanctions issue. Petitioners sought review, and their petition was held pending this Court's decision in *State v. Lile*, 188 Wn.2d 766, 398 P.3d 1052 (2017). Following that decision, this Court granted review and remanded to Division Two "for reconsideration in light of" this Court's decision in *Lile*. *See* 189 Wn.2d 1016, 404 P.3d 498 (Table). Godfrey's answer had requested review of the sanctions issue, but had not provided a statement of the issue and had not addressed the criteria for review under RAP 13.4(b); this Court's remand order did not address the sanctions issue.

Following supplemental briefing addressing *Lile*, Division Two reinstated its reversal. *See* No. 46963-4-II, 6 Wn. App.2d 1046, 2018 WL 6813964 (Dec. 27, 2018). Petitioners again sought review. Godfrey's answer again requested review of the sanctions issue, and again did not provide a statement of the issue or address the criteria for review under RAP 13.4(b). This Court granted the petition and, as before, did not address the sanctions issue.

⁸ Also on December 1, 2014, the trial court granted Petitioners' motion for an award of fees and costs and imposed a \$10,000 sanction on Mr. Godfrey's counsel, as anticipated by its prior sanctions ruling. CP 761-62. Godfrey's counsel separately appealed that ruling. Petitioners do not believe that counsel has preserved his challenge to that sanction.

II. SUPPLEMENTAL ARGUMENT

A. **The evolution of the affidavit of prejudice statute confirms that the Legislature intends that rulings of the sort at issue here be treated as discretionary.**

The parties have previously briefed how to interpret RCW 4.12.050, including the import of this Court's decision in *State v. Lile*. The fullest development of Petitioners' analysis of these matters will be found in their Petition for Review (filed March 15, 2019), and in their Supplemental Brief to the Court of Appeals (filed February 13, 2018) following this Court's remand for reconsideration in light of *State v. Lile*.

This Court observed in *Lile* that, in amending the judicial disqualification statute in 2017, the Legislature "did not depart from its basic discretionary/nondiscretionary framework." *Lile*, 188 Wn.2d at 775 n.5. What has been missing from prior analyses, by either Godfrey or Petitioners, is an examination of the evolution of what eventually became that "basic ... framework," presently codified at RCW 4.12.050. Petitioners now set forth the result of their examination of that statutory evolution, which confirms that the Legislature intended for rulings of the sort at issue here to be treated as discretionary.

1. **For purposes of determining legislative intent under this Court's context rule of statutory interpretation, the context of a statute includes a legislative statement of purpose.**

The meaning and application of a statute is determined *de novo* from the statute's language and context in order to carry out the Legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12,

43 P.3d 4 (2002) (adopting the “context” rule for statutory interpretation). Ascertaining legislative intent includes consideration of “ ‘all that the Legislature has said in a statute and related statutes which disclose legislative intent about the provision in question’ ... [and] an enacted statement of legislative purpose is included in a plain reading of a statute.” *G-P Gypsum Corp v. Dep’t of Revenue*, 169 Wn.2d 304, 309-310, 237 P.3d 256 (2010) (quoting *Campbell & Gwinn, supra*).⁹

2. The original Territorial disqualification statute was part of the venue section of the judicial code. In 1911 the Legislature separated the disqualification statute from the venue section, and replaced an appearance-of-fairness test with actual “prejudice,” which could be established by filing an affidavit of prejudice.

The territorial predecessor to the judicial disqualification statute was adopted in 1854, as part of the venue statute. Code of 1854 §16, at 134 (App. B-3).¹⁰ It provided for a change in judge “[w]hen the judge shall be interested in the action, or connected by blood or affinity with any person so interested, nearer than in the fourth degree” or when a party filed an affidavit “stating that the judge ... [is] so prejudiced against him, that he cannot expect an impartial trial[.]” *Id.* A party was entitled to only one

⁹ As Petitioners will show, an additional facet of the context analysis for this case involves tracing the evolution of what is now RCW 4.12.050 through a series of changes predating the establishment of the Revised Code of Washington in 1951. The codes that preceded the “RCW” have a complex history, ably set forth by Seattle University Law School Reference Librarian Kelly Kunsch in his 1989 article, “Statutory Compilations of Washington,” found at 12 Univ. of Puget Sound L. R. 285.

¹⁰ For the Court’s convenience, the key portions of the statutory evolution have been reproduced in Appendix B to this brief, in chronological order. That appendix has been internally paginated, and Petitioners will provide a parallel cite to that appendix, and specifically to the internal pagination. Thus, the parallel appendix cite for §16 of the Code of 1854 is “App. B-3.”

change of judge absent a new disabling fact. *Id.* §17 (also at page 134). The three specified bases to disqualify judges went to the core of whether a judge could be fair and impartial, and anticipated later due process and appearance of fairness decisions: a financial stake in the ultimate outcome; blood relationship to a party; or a pre-existing prejudice against one of the parties in the pending proceeding.¹¹ The early decisions focused on these and similar issues.¹²

This territorial scheme was substantially carried forward after Washington became a state. By 1909, as § 209 of the Remington & Ballinger Code, the statute read:

The court may, on motion, in the following cases, change the place of trial, when it appears by affidavit or other satisfactory proof...

* * * *

4. That from any cause the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity within the third degree; when he has been of counsel for either party in the action or proceeding.

¹¹ This Court recognized early on that personal bias of a decision-maker can violate due process. *State ex rel. Barnard v. Seattle Board of Ed.*, 19 Wash. 8, 52 P. 217 (1898) (recognizing due process right to an impartial decision-maker who had not made up his mind before hearing the case). Later Washington decisions are in accord that bias, personal interest, or prejudgment of a case or party are not tolerated, whether under appearance of fairness or due process principles. *See, e.g., Tatham v Rogers*, 170 Wn. App. 76, 90-92 (due process), 92-96 (appearance of fairness), 283 P.3d 583 (2012).

¹² For instance, in *State ex rel. Cougill v. Sachs*, 3 Wash. 691, 20 P. 446 (1892) (which appears to be the first Supreme Court decision to address judicial disqualification after Washington became a state), this Court vacated a decision by a superior court judge who, though he had been disqualified because he had represented the defendant in the matter before being elected to the bench, nevertheless had subsequently granted a motion by the defendant's new attorney to vacate a judgment entered by a *pro tem* judge who had been properly accepted in writing by the parties and had taken over the case. *Id.*, 3 Wash. at 694-695.

1 REMINGTON & BALLINGER’S ANNOTATED CODES AND STATUTES OF WASHINGTON, § 209 at page 241 (1909) (App. B-5). Parties continued to be limited to one change, absent a new disabling fact, *id.* §210; parties could also stipulate to a change of “the place of trial,” in which case the court to whom the application was made had to order the change. *Id.* §216 at page 242 (App. B-6).

The disqualification statutory status quo remained in place until 1911, when the Legislature passed Senate Bill No. 230. *See* App. B-7 through B-10 (bill, journal, and session law). The 1911 revision severed judicial disqualification from the general change of venue provisions, and—of particular importance to the resolution of this case—replaced the appearance of fairness-type specifications with a single “prejudice” test, which could be satisfied with an affidavit that alleged:

...the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: *Provided, further,* That no party or attorney shall be permitted to make more than one application in any action or proceeding under this act.

Senate Bill No. 230 (1911) (App. B-7); Laws of 1911, Ch. 121 (App. B-10).

3. **Problems with the 1911 changes ultimately led to a major revision in 1927, resulting in the statutory structure for disqualification that still prevails today. This change was recommended by a Joint Committee on Revision of Laws established in 1925, and that Committee’s Note explaining the reasons and goals for the change was a part of the bill enacted by the Legislature.**

The 1911 changes did not specify a time-frame or procedural posture after which such an affidavit would be untimely. This omission all

too rapidly produced a problem, involving a literal reading of the statute that would have allowed a party to file their affidavit “at any time prior to the entering of the judgment” once they got a ruling they did not like. *State ex rel. LeFebvre v. Clifford*, 65 Wash. 313, 315-316, 118 P. 40 (1911).¹³ *Clifford* began what proved to be a series of nine Supreme Court decisions in just over a decade, which led in turn to the study of the statute by the “Joint Committee on Revision of Laws” (the “Joint Committee”).

The Joint Committee was created by the passage of Senate Joint Resolution No. 6 during the regular session of the 19th Legislature in 1925. *See* Senate Journal entry for Jan. 1, 1926 (reciting the history of the creation of the Joint Committee the year before) (App. B-12 & 13).¹⁴ The Joint Committee was composed of three members each of the Senate and the House, and was charged with review of all laws and proposing changes to those “manifestly obsolete or in need of revision.” *Id.* Their proposed bills and accompanying “Notes” were checked by two members of each chamber. The “Notes” were integral to the Committee’s proposed bills, including being part of the bill document itself. Legislators voting for a bill

¹³ *Clifford* rejected that literal reading as contrary to “the evident intention of the Legislature that [an] ... objection should be made orderly and in time, to the end that there should be no undue interference with the administration of justice, while at the same time parties litigant should be protected against prejudiced judges.” 65 Wash. At 316.

¹⁴ The only legislative document uncovered from 1925 simply described SJR 6 as having originated from the Committee on Rules and Joint Rules. *See* App. B-11 (undated document). The recital of the history is set forth in Senate Joint Resolution No. 5, providing for the continuation of the Joint Committee for another year, which was passed by the Senate on January 1, 1926. The Joint Committee is referred to in the Senate Journals through 1929; the State Law Library librarian found no references to it after the 1929 session

recommended by the Joint Committee were voting to endorse the explanatory “Note” as well as the statutory text.

The 1927 revision to the disqualification statute was a response to the nine Supreme Court decisions since the passage of the 1911 statute, as detailed in the Joint Committee’s “NOTE” (“Note”) incorporated into Senate Bill 64 (App. B-14 through B-17). Senate Bill 64 and its Note were “[c]hecked with statutes and/or decisions by Senators Palmer and Hastings, and Representatives Falknor and Soule.” *Id.* The Note identified the need to restore clarity to Washington’s disqualification law, which had been lost as the Supreme Court struggled with the changes made in 1911. Note, ¶3 (App. B-15). The Note quoted at length from *State v. Clark*, 125 Wash. 294, 216 P. 17 (1923), in which the Supreme Court first acknowledged the confusion created by its decisions, and then articulated what the Justices in that case evidently believed to be the correct query for deciding if a prior trial court decision has foreclosed a subsequent affidavit of prejudice:

[T]he question of whether the affidavit was timely presented is not a question of what actually took place, **but of what might have occurred.**

State v. Clark, 125 Wash. at 297, as quoted in the Note (emphasis added) (App. B-16).

The Joint Committee proposed to restore clarity by a statutory change “combin[ing]” the Supreme Court’s holding in *Clark* with the Supreme Court’s earlier decision in *State ex rel. Mead v. Superior Court*, 108 Wash. 636, 185 P. 628 (1919). Note, ¶13 (app. B-16). The Joint Committee explained that this would be achieved by amending

Washington’s statute along the lines of a Montana statute that expressly excepted certain specified decisions from pre-empting an affidavit of prejudice, “in the interest of making *definite and certain* the time when an affidavit of prejudice on the part of a judge must be filed.” Note, ¶17 (emphasis added) (App. B-16). The Joint Committee went on to state that the specified decisions:

are to all practical intents and purposes administrative rather than judicial acts and with the possible exception of setting a date for trial and fixing bail, where the parties disagree, call for the exercise of no discretion even, on the part of the judge. But even assuming that in setting a date for trial or fixing bail a judge should so act as to lead the disappointed party to believe that he cannot have a fair trial before such judge, would it not be more in accordance with our ideas of justice to permit the filing of the affidavit of prejudice afterwards than to compel the party to go to trial before a judge in which he did not have confidence.

Note, ¶19 (emphasis added) (App. B-16 and B-17).

- 4. The declared purpose of the 1927 changes reflected in the Joint Committee’s Note, to recognize a distinction between “administrative rather than judicial acts” and treat all of the latter as discretionary rulings, is effectuated by holding that the grant of the stipulated motion at issue here was a discretionary ruling.**

The Legislature’s declared intent to distinguish, as the Joint Committee’s Note put it, between “acts that are to all practical intents and purposes administrative rather than judicial acts[,]” continues to be reflected in the language of a statute that has remained substantially unchanged since 1927.¹⁵ The Joint Committee’s Note substantively corresponds to

¹⁵ The amended disqualification statute was codified in volume two of the first edition of Remington’s Revised Statutes of Washington, §§ 209-1, 209-2, and 210, at pages 170

contemporary statements of legislative purpose, which play a vital role in determining legislative intent under the context rule of statutory interpretation. The Note demonstrates a legislative intent to distinguish between acts that are merely administrative and acts that are judicial, by identifying the former in a list of decisions that will be *deemed* not discretionary, and which therefore do not foreclose a party from subsequently invoking the protections of the statute.

The administrative-judicial act distinction intended by the Legislature also resonates in this Court's opinions. Form orders setting an initial case schedule are plainly administrative and not judicial acts; they also are not discretionary rulings under the disqualification statute. *See State v. Parra*, 122 Wn.2d 590, 602, 859 P.2d 1251 (1993). On the other hand, discovery orders that do not involve a matter of right, but fall within the power of a trial court to grant or deny, are quintessential judicial acts; they also are discretionary rulings under the disqualification statute. *See id.* at 597 (quoting the definition of discretion set forth in *Rhinehart v. Seattle Times Co.*, 51 Wn. App. 561, 578, 754 P.2d 1243 (1988)).¹⁶

Case management has become an essential tool for assuring that civil justice is not so delayed that it risks becoming justice denied by the

through 172. *See* App. B-XX through B-XX. This Court held that the 2017 changes to RCW 4.12.050 merely added to the list of court actions that do not result in losing the right to a change of judge, and did not change the basic structure of the statute. *Lile*, 188 Wn.2d at 775, n.5. And that basic structure was put in place in 1927.

¹⁶ This Court in *Parra* expressly acknowledged *Rhinehart's* reliance on *State ex rel. Mead v. Superior Court*, for *Rhinehart's* definition of discretion. *See Parra*, 122 Wn.2d at 597. And, as previously discussed, this Court's decision in *Mead* was one of two decisions whose holdings the Joint Committee expressly combined in the amendment that, when adopted by the Legislature in 1927, became the disqualification statute we have today.

length of that delay. For that reason, the Pierce County Local Rules authorize a delay in compliance with case management deadlines only if good cause for that delay has been shown. PCLR 3(e). Even if, as here, the requested delay is agreed to by all the parties, the trial court still has to determine whether there is good cause for that delay. Determining whether there is good cause is yet another quintessential judicial act. And the need for that determination made the matter here a question of whether to grant or deny the requested relief, and therefore a discretionary ruling under the disqualification statute. *See Lile*, 188 Wn.2d at 778.

To say instead, as the Court of Appeals did here, that such a decision is discretionary for purposes of the statute only if it *also* has what some trial court may consider to be a demonstrable impact on a court's day-to-day calendar, conflicts with the Legislature's expressly intended distinction between administrative and judicial acts. The Court of Appeals' approach can only result in the kind of confusion that the 1927 amendment was designed to end. This Court should avoid that result by reversing the Court of Appeals, and reinstating the trial court's judgment.

B. Godfrey's attempt to resurrect his appeal of the trial court's sanctions ruling comes too late under RAP 13.4(d). And even if this Court decides to reach the issue, the trial court's judgment should still be reinstated because Godfrey cannot show that any *Burnet* error was prejudicial to his case at trial.

1. Godfrey's attempt comes too late.

RAP 13.4 provides that, if a party answering a petition wishes to have an issue reviewed that was not raised in the petition, "including any

issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer.” RAP 13.4(d). And it is well established that, to “raise” an issue for review, a party must specifically describe the issue in a concise statement of issues presented for review *and* must specifically address the criteria for review set forth in RAP 13.4. *State v. Korum*, 157 Wn.2d 614, 624-25, 141 P.3d 13 (2006); *see also* RAP 13.4(b) (setting forth criteria for review). RAP 13.7(b) does provide that, if this Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, this Court “will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues.” RAP 13.7(b). Yet this Court’s prior precedents, together with the drafter’s comment accompanying the 2006 amendment to RAP 13.4(d), make clear that RAP 13.7(d) must be read *in conjunction with* RAP 13.4(b)’s requirement that a party “must raise” the issue in its answer or else it is waived. *State v. Barker*, 143 Wn.2d 915, 919-20, 25 P.3d 423 (2001) (“This court ordinarily will not review issues not presented in the petition for review or the answer.”); RAP 13.4, Drafter’s Comment, 2006 Amendment (noting that RAP 13.4(d) was amended to clarify that parties must raise additional issues in answers to petitions for review to avoid the “plausible but erroneous interpretation [of RAP 13.7(b)] . . . that an issue raised but not decided in the Court of Appeals need not be raised in an answer to a petition for review”).

In his answer to the petition seeking review of Division Two’s 2016 decision, Godfrey said nothing about the sanctions issue until a footnote

lodged in the “Conclusion” section of his answer. There, Godfrey asserted that, if this Court granted review, it should also take up the sanctions issue. Godfrey provided no separate statement of the issue, and set forth no analysis as to why review was warranted under any of the criteria set forth in RAP 13.4(b). This Court’s order granting review and remanding “for reconsideration in light of” *Lile* said nothing about the sanctions issue, nor did Division Two address it on remand. And when Petitioners sought review of the remand decision, and Godfrey again asked this Court to address the sanctions issue, once more he did so without a statement of an issue or any analysis of the criteria for review under RAP 13.4(b). If Godfrey’s procedural defaults do not constitute a waiver of his appellate quarrel with the sanctions order, then the language added in 2006 to RAP 13.4(d) might as well be stricken from the rule.

2. Godfrey cannot show prejudice at trial.

Even if this Court concludes that Godfrey has not waived the sanctions issue, this Court should still deny relief.

- ***First***, Godfrey failed to provide the Court with an adequate record for review. His quarrel with the sanctions order focuses on the exclusion of the documents that made up Exhibits 13, 14, and 15. Yet Godfrey failed to designate any of those exhibits as part of the appellate record. This failure deprives this Court of the ability to examine those documents to determine whether any of them could have supported

Godfrey's manufacturing defect claim.¹⁷ Appellate relief from the trial court's sanctions order should be rejected on this ground alone. *Stevens County v. Loon Lake Prop. Owners Ass'n*, 146 Wn. App. 124, 131, 187 P.3d 846 (2008) (citing *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988) (a trial court decision must be affirmed if the appellant fails to provide an adequate record).

- ***Second***, Godfrey failed to show that any error in refusing to allow him to offer documents from Exhibits 13, 14, or 15 was prejudicial to his case at trial. The trial court made specific findings as to why Godfrey failed to prove his case, including a finding as to why the court rejected as unpersuasive the testimony of Mr. Heiberg, Godfrey's only expert who addressed cause-in-fact. *See* CP 691-92 (FOF No. 8). Incredibly, ***Godfrey did not assign error to this or any other specific finding***, which—of course—makes all of them verities on appeal. Moreover, although Godfrey's counsel did refer by Bates Stamp production number to several pages from Exhibit 13, during an offer of proof pertaining to Heiberg's testimony, nothing in that offer shows how those documents could have remedied the specific deficiencies that ultimately persuaded the trial court to reject Heiberg's testimony. *See* RP 498-502. And, again, ***Godfrey never put those pages into the appellate record.***

¹⁷ Godfrey's apparent attempt to salvage his failure to get Exhibits 13, 14, and 15 into the record, by designating his purported "summaries" of portions of those exhibits relating to work orders on Ste. Michelle's bottling line and customer complaints, is not a substitute for the actual documents. The summaries also fall woefully short of the standard for admission of summaries under ER 1006. CP 599; *cf. Sanders v. State*, 169 Wn.2d 827, 851, 240 P.3d 120 (2010) (upholding admission of summaries on ground that the underlying documents were in the record).

Godfrey's claim that the trial court's sanctions ruling excluded "nearly all" of Godfrey's liability evidence (Brief of Appellants at 1, 4, 14) is demonstrably false. The trial court admitted 43 of Godfrey's exhibits, and permitted Godfrey to call both his liability experts. And, there were multiple objections, beyond the sanctions order, to justify the exclusion of the exhibits in any event. CP 315-24. Godfrey lost because the trial court found his evidence not credible, and the Petitioners' evidence "credible and persuasive." CP 691-92. A *Burnet* error is not some sort of automatic get-out-of-jail-free card—certainly not when the complaining party has had a trial on the merits and lost; harmless error becomes the standard, and prejudice must be shown. *Jones v. City of Seattle*, 179 Wn.2d 322, 338, 314 P.3d 380 (2013). And Godfrey did not provide a record from which such prejudice could begin to be deduced.

III. CONCLUSION

This Court should reverse the Court of Appeals and reinstate the judgment dismissing Godfrey's claims with prejudice.

Respectfully submitted this 30th day of July, 2019.

CORR CRONIN LLP

By:

MBK for
Emily J. Harris, WSBA 35763
Kelly H. Sheridan, WSBA 44746

CARNEY BADLEY SPELLMAN,
P.S.

By:

M. Michael B. King
Michael B. King, WSBA 14405
Gregory M. Miller, WSBA 14459

Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

Email via Appellate Portal to the following:

Emily J. Harris Corr Cronin Michelson Baumgardner Fogg & Moore LLP 1001 4th Ave Ste 3900 Seattle WA 98154-1051 eharris@correronin.com lnims@correronin.com elesnick@correronin.com	Robert B. Kornfeld Kornfeld Trudell Bowen Lingenbrink PLLC 3724 Lake Washington Blvd NE Kirkland WA 98033-7802 rob@kornfeldlaw.com
Howard M. Goodfriend Ian C. Cairns Smith Goodfriend, PS 1619 8th Ave N Seattle WA 98109-3007 howard@washingtonappeals.com ian@washingtonappeals.com	

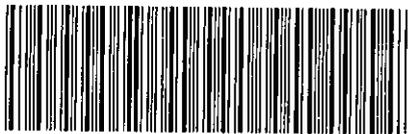
DATED this 30th day of July, 2019.



Patti Saiden, Legal Assistant

APPENDICES

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12-2-12968-7 43608198 FNFL 11-10-14

THE HONORABLE KATHERINE M. STOLZ

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

ROLFE GODFREY and KIRSTINE
GODFREY, husband and wife and their marital
community composed thereof,

Plaintiffs,

v.

STE. MICHELLE WINE ESTATES LTD. dba
CHATEAU STE. MICHELLE, a Washington
Corporation; and SAINT-GOBAIN
CONTAINERS, INC.,

Defendants.

No. 12-2-12968-7

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

~~PROPOSED~~ *[Signature]*



FINDINGS OF FACT AND CONCLUSIONS OF LAW

CORR CRONIN MICHELSON
BAUMGARDNER & PREECE LLP
1001 Fourth Avenue, Suite 3900
Seattle, Washington 98154-1051
Tel (206) 625-8600
Fax (206) 625-0900

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Introduction

The parties have presented their evidence in this matter to the Court, without a jury, from September 29, 2014 to October 22, 2014. The undersigned judge presided at trial.

Plaintiff Rolfe Godfrey appeared personally at trial and through his attorneys of record, Kornfeld, Trudell, Bowen & Lingenbrink, Robert B. Kornfeld, Inc., P.S., and Wild Sky Law Group, PLLC. Defendants Ste. Michelle Wine Estates Ltd. (“Ste. Michelle”) and Saint-Gobain Containers, Inc. (“Saint-Gobain”) appeared through their respective corporate representatives and through their attorneys of record, Corr Cronin Michelson Baumgardner & Preece LLP.

The witnesses who were called by Plaintiff and who testified at trial are identified in the witness list attached hereto as **Exhibit A**.

The exhibits that were offered and admitted into evidence are set out in the exhibit list attached hereto as **Exhibit B**.

The Court has had the opportunity to hear the testimony of the witnesses, to observe the demeanor of each witness, to assess the credibility of each witness, and to determine the weight to be given to the testimony of each witness. Based upon the evidence presented at trial, the Court hereby makes the following findings and conclusions:

Findings of Fact

Concerning Jurisdiction

1. Plaintiff Rolfe Godfrey was a resident of Washington State at all relevant times. Defendants Saint-Gobain and Ste. Michelle transacted business within Washington State at all relevant times. No party contests jurisdiction.

Procedural History

2. Mr. Godfrey and his estranged wife, Kirstine Godfrey, filed a Complaint in this matter on September 20, 2012. In the Complaint, Mr. Godfrey asserted numerous common law and strict product liability claims, and Ms. Godfrey asserted claims on her own behalf for loss of

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1 consortium. At the time of trial, all claims had been dismissed by stipulation of the parties, or by
2 the Court on summary judgment, except for Mr. Godfrey's ~~summary judgment~~ claim under the
3 Washington Product Liability Act (WPLA), ch. 7.72 RCW, alleging that a product manufactured by
4 the Defendants was not reasonably safe in construction.

5 **Background**

6 3. On February 13, 2010, at approximately 7:30 p.m., a glass wine bottle broke in the
7 hand of Plaintiff Mr. Godfrey while he was opening it with a corkscrew, resulting in a laceration of
8 Mr. Godfrey's left thumb (the "incident"). The top and upper portion of the neck of the bottle broke
9 into pieces that were not ~~preserved by Mr. Godfrey or the Olive Garden.~~ ^{preserved & presumably were discarded. (KUS)} The remainder of the bottle
10 was introduced into evidence at trial. Exhibit 39. Both the cork from the incident bottle and the
11 corkscrew Mr. Godfrey used to open it were likewise not preserved.

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12 4. The incident bottle was manufactured by Defendant Saint-Gobain, and bottled with
13 wine by Defendant Ste. Michelle at its Columbia Crest Winery in Paterson, Washington on August
14 4, 2009. Following bottling, the incident bottle was sold to non-party Coho Distributing LLC, a
15 beverage distributor, which stored the bottle in its warehouse before transporting it to the Olive
16 Garden on January 28, 2010, where it was stored until the time of the incident.

17 **Liability**

18 5. The central disputed issue at trial was what caused the incident bottle to break.
19 Plaintiff argued that the bottle was manufactured out of specification for perpendicularity (or "lean"),
20 which caused it to be damaged during the bottling process, and that this damage later caused the
21 bottle to break while it was being opened by Mr. Godfrey. Defendants argued that the bottle broke
22 because of contact damage from the corkscrew Mr. Godfrey was using when he attempted to open
23 the bottle.

24 6. Plaintiff called two liability experts at trial, William Hamlin and Eric Heiberg. Mr.
25 Hamlin has worked in the bottling line industry for a number of years, and is knowledgeable about

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1 bottling lines. He did not, however, offer any testimony concerning what caused the incident bottle
2 to break nor any opinion concerning whether the incident bottle was defective when it left the
3 possession and control of Ste. Michelle.

4 ⁷ Mr. Heiberg is a professional engineer who has experience in product failure analysis.
5 ~~He has very limited training and experience with glass products, however, and what experience he~~ ^{HIS} ~~has~~
6 ^{has} is primarily with flat glass, as opposed to container glass. Mr. Heiberg testified that he examined
7 and took measurements of the incident bottle, which he found to be both "out of round," and to have
8 a "rocker bottom." Mr. Heiberg admitted that neither the "out of round" measurement nor the
9 "rocker bottom" measurement he relied upon for the incident bottle exceeded the manufacturer's
10 specifications. He testified, however, that when the two measurements were combined, the net effect
11 was that it was possible for the incident bottle to exceed the manufacturer's specification for
12 perpendicularity, and that, as a result, the bottle could have been damaged during the bottling process
13 on Ste. Michelle's bottling line.

14 8. The Court does not find Mr. Heiberg's opinion persuasive. First, there was
15 persuasive evidence at trial that significant differences exist between flat glass (Mr. Heiberg's area
16 of prior experience) and container glass (the specialty of defense expert Rick Bayer, discussed
17 below), including the types of stresses that act upon flat and container glasses. Second, Mr.
18 Heiberg's measurement methodology of the incident bottle was not reliable because he did not use
19 accepted industry standards to measure the bottle; instead he measured the bottle while it rested on
20 a wooden conference table, rather than placing it upon a machine-ground metal plate (which was the
21 method employed by Mr. Bayer, who derived different measurements). Third, the Court finds
22 persuasive the testimony by defense experts that, even if Mr. Heiberg's underling measurements
23 were correct, his perpendicularity calculations combining the effects of "out of round" and "rocker
24 bottom" would only be justified in the unlikely event that those two conditions lined up exactly –
25 i.e., that the incident bottle was out of round and had a rocker bottom that each caused it to lean in

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the exact same direction — and that it was ~~much more~~ likely that two such conditions would cancel each other ~~to some degree~~ (MS) Fourth, the Court also finds persuasive the testimony of defense experts that a small crack or other defect in the top of the incident bottle that weakened the glass would not have withstood the stress exerted by the cork once it was inserted into the bottle, and that the bottle, under Plaintiff's theory, would therefore have broken long before it reached Mr. Godfrey.

9. Defendants called Rick Bayer, a Glass Technology Specialist with American Glass Research. Mr. Bayer has worked in the glass container industry for his entire 40-year career, and has been conducting glass fracture analyses since 1975. He has conducted in excess of 25,000 glass fracture analyses, and has taught classes and given lectures on glass fracture analysis. Mr. Bayer testified that the remaining portion of the incident bottle exhibited a classic "J" crack fracture pattern. He further testified that this pattern occurs when a corked bottle is fractured at or near the top of the bottle, with the fracture originating within the zone of the circumferential tension stress caused by the cork pressure, that a "J" crack fracture originates and completes itself at the time that the damage giving rise to the fracture occurs. He further testified that he had examined approximately 15-18 other "J" crack fractures in his career and in each case the cause of the fracture had been contact damage with a corkscrew. Mr. Bayer also testified that he examined the surface of the fracture with a microscope, and observed "ripple" marks indicating that the origin of the fracture was on the inside surface of the top of the incident bottle. Mr. Bayer testified that based upon his inspection of the bottle, his knowledge and experience concerning "J" crack fractures, and his observation of the ripple marks, that the bottle broke from contact damage with a corkscrew.

10. The Court finds Mr. Bayer's opinion credible and persuasive. First, Mr. Bayer's analysis concerning the "J" crack fracture pattern and the evidence of ripple marks on the surface of the fracture was uncontroverted by Plaintiff's experts. Second, Mr. Godfrey's testimony concerning the incident supported Mr. Bayer's conclusion that the cause of breakage was contact damage with a ~~corkscrew~~ (MS) ^{tended to} (MS) ~~corkscrew~~ (MS) ^{single lever wine key.} (MS) Mr. Godfrey testified that he removed the foil from the top of the

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bottle, and examined it for chips, cracks, or other imperfections before inserting the corkscrew. Mr. Godfrey also testified that he successfully extracted the cork one-third to one-half way out of the bottle before it broke, ~~which shows that the glass in the finish of the bottle was strong at the time of Mr. Godfrey's initial pull with the corkscrew, but then suddenly became weak and broke as he continued extracting the cork.~~ Finally, Mr. Godfrey testified that the finish of the bottle broke into

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as presented would invite the

Court to speculate

11. The Court finds that the Plaintiff's evidence was speculative, and Plaintiff has not carried his burden to prove, by a preponderance of the evidence, that the incident bottle contained a construction defect at the time it left the control of the Defendants that caused injury to Mr. Godfrey. The Court further finds credible and persuasive the testimony of defense expert Mr. Bayer, who opined that that the incident bottle broke because of contact damage caused by a corkscrew at the moment the bottle broke. Accordingly, based upon the testimony and evidence at trial, the Court finds that the cause of the bottle breakage resulting in Mr. Godfrey's injuries was Mr. Godfrey's own use of a corkscrew in a manner that caused the incident bottle to break.

Damages

12. Because the Court finds in favor of Defendants on the issue of liability, the Court does not enter any findings concerning damages.

Conclusions of Law

Jurisdiction

1. This Court has jurisdiction over this matter because both Defendants transact business in the State of Washington, and jurisdiction is otherwise proper. RCW 4.28.185; *Shute v. Carnival Cruise Lines*, 113 Wash. 2d 763, 783 P.2d 78 (1989). The parties did not contest whether the Court has jurisdiction.

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In General

2. Under the Washington Product Liability Act (WPLA), “[a] product manufacturer is subject to strict liability to a claimant if the claimant’s harm was proximately caused by the fact that the product was not reasonably safe in construction.” RCW 7.72.030. A product is not reasonably safe in construction if, “when the product left the control of the manufacturer, the product deviated in some material way from the design specifications or performance standards of the manufacturer, or deviated in some material way from otherwise identical units of the same product line.” RCW 7.72.030(2)(a).

3. In addition, in determining whether a product is reasonably safe, “the trier of fact shall consider whether the product was unsafe to an extent beyond that which would be contemplated by the ordinary consumer.” RCW 7.72.030(3). In determining the reasonable expectations of the ordinary consumer, the following factors must be considered: “The relative cost of the product, the gravity of the potential harm from the claimed defect and the cost and feasibility of eliminating or minimizing the risk may be relevant in a particular case. In other instances the nature of the product or the nature of the claimed defect may make other factors relevant to the issue.” *Seattle-First Nat’l Bank v. Tabert*, 86 Wn.2d 145, 154, 542 P.2d 774 (1975). The consumer expectations test does not relieve a plaintiff of the necessity of showing “the product is unchanged from the condition in which it was sold and the unusual behavior of the product is not due to any conduct on the part of the plaintiff or anyone else who has a connection with the product.” *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 991 P.2d 728, 733 (2000); *see also* RCW 7.72.030(2)(a).

4. Case law has held that the consumer-expectations approach is an independent alternative for design defect cases under the WPLA. *Falk v. Keene Corp*, 113 Wn.2d 645, 654, 782 P.2d 974 (1989). No Washington case has held, however, that the consumer expectations approach of RCW 7.72.030(3) is independent from the material deviation approach of RCW 7.72.030(2)(a) in a construction defect case. The consumer expectations test does not appear well-suited to determine

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a construction defect case, as the multi-factor analysis required for application of the test does not lend itself well to determining whether a product contained a construction defect. Accordingly, the Court holds that a claimant under the WPLA may not prove a construction defect only by means of the consumer-expectations approach. As discussed below, however, even if the consumer expectations test is applied in this case, Plaintiff has failed to prove his claim under that theory.

Construction Defect

5. Plaintiff's theory of liability in this case is that the incident wine bottle was damaged during the wine bottling process. In support of that theory, Plaintiff put forward the testimony of two experts, William Hamlin and Eric Heiberg. For the reasons set forth above in the Findings of Fact, the opinions of Mr. Hamlin and Mr. Heiberg are not persuasive. In addition, as discussed in the Findings, the Court found that defense expert Rick Bayer's glass fracture analysis was credible and persuasive, and that, on a more probable than not basis, the cause of breakage was contact damage with a corkscrew. Therefore, Plaintiff has not carried his burden of showing, by a preponderance of the evidence, that the incident bottle contained a construction defect that caused him injury.

Consumer Expectations

6. In the alternative, Plaintiff argued that the Court should infer the presence of a construction defect under the consumer expectations test by finding that a wine bottle that breaks while being opened does not meet the reasonable expectations of a consumer. Plaintiff argued that the Court need not consider the testimony of his experts, Mr. Hamlin and Mr. Heiberg, and moreover that he need not even present any proof of a construction defect, to prevail under the consumer expectations test. As discussed above, it appears that no Washington case has applied the consumer expectations test to a construction defect WPLA claim, and the Court does not believe it should be so applied for the first time in this case. Even if it did apply, however, the consumer expectations test would not apply in this case. The consumer expectations test may be applied only in certain

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types of cases, “in which there is *no evidence, direct or circumstantial*, available to prove exactly what sort of manufacturing flaw existed, or exactly how the design was deficient.” *Pagnotta*, 99 Wn. App. at 733 (emphasis added). Here, however, there was evidence in the form of the remaining part of the incident bottle, and the Court found that Mr. Bayer’s glass fracture analysis and conclusions based upon his inspection of the remaining bottle were credible and persuasive.

7. In addition, Plaintiff’s position that he need not present any evidence of a construction defect whatsoever, other than the fact of the accident, is not sufficient to carry his burden under the consumer expectations test. *See Bich v. Gen. Elec. Co.*, 27 Wn. App. 25, 31, 614 P.2d 1323, 1327 (1980) (“The mere fact of an accident alone does not establish that a product was defective.”); *see also Pagnotta*, 99 Wn. App. at 72 (“[T]he strict liability doctrine does not impose legal responsibility simply because a product causes harm.”).

8. Moreover, the consumer expectations test does not relieve Plaintiff of the necessity of showing that “the product is unchanged from the condition in which it was sold and the unusual behavior of the product is not due to any conduct on the part of the plaintiff or anyone else who has a connection with the product.” *Pagnotta*, 99 Wn. App. at 28; *see also* RCW 7.72.030(2)(a). As discussed above, the Court found that the cause of the breakage was conduct on the part of Mr. Godfrey himself.

9. Finally, application of the consumer expectations test requires consideration of the *Tabert* factors, and Plaintiff failed to offer necessary evidence on these factors.

10. Regardless of the theory upon which he relies, Plaintiff has failed to prove a construction defect claim under the WPLA.

Damages

11. Because Plaintiff has failed to prove his claim, the Court does not reach the issue of damages.

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ORDER

The Court declares that Plaintiff has failed to establish the essential elements of a construction defect claim under the WPLA, and therefore finds for Defendants.

DATED this 7th day of NOVEMBER, 2014

Katherine M. Stolz
KATHERINE M. STOLZ
SUPERIOR COURT JUDGE

FILED
DEPT. 2
IN OPEN COURT
NOV - 7 2014
Pierce County Clerk
By *[Signature]*
DEPUTY

[Signature]

Scann ALGAN # 38764
Defendants

Copy received; form disputed
Roxanne Eberle
Roxanne Eberle, WSPA # 41273
Plaintiff

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Exhibit A

Testifying Witnesses

Plaintiff's Witnesses

William Hamlin

C. Stephen Settle, M.D.

Eric Heiberg, P.E.

John Fontaine

Alan Thomas, M.D. (video deposition)

Frederick DeKay

Daniel Hayes

Jason Morgan (deposition transcript)

Caleb Culver (deposition transcript)

Kirstine Godfrey

Rolfe Godfrey

Julie Johnson (deposition transcript)

Defendants' Witnesses

Rick Bayer

Merrill Cohen

Lorraine Barrick

Jim Goldman

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Exhibit B

Admitted Exhibits

Ex. #	Description
1	Medical & Billing Records of Multicare
2	Medical & Billing Records of MVP Physical Therapy
3	Medical & Billing Records of Puget Sound Orthopedics
4	Medical & Billing Records of Dr. Stephen Settle (ERAT)
5	Medical & Billing Records of Tacoma Orthopedic Surgeons
6	Medical & Billing Records of Seattle Hand Surgery Group
7	Medical & Billing Records of St. Clare Hospital
8	Medical & Billing Records of Amy Hanson
9	Medical & Billing Records of Blue Moon Healing
10	Medical & Billing Records of Right Touch Therapy
11	Billing Records of Bartell Drugs
12	Billing Records of Walgreens
15A	Pick Sheet & Remittance –excerpt from Darden
16	Documents Produced by H&R Block
19	Godfrey Return to Work Offer from Olive Garden
20	Godfrey Tax Returns 2006-2011
24A	Plaintiff's Summary of Medical Specials w/backup
29A	Fred DeKay Earnings History Table for Rolfe Godfrey (illustrative purposes only)
29B	Fred DeKay Summary of Calculations of Economic Loss for Rolfe Godfrey (illustrative purposes only)
29C	Fred DeKay Present Value of Life Care Plan Costs for Rolfe Godfrey (illustrative purposes only)

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Ex. #	Description
31	Defendants' Answers to Plaintiff's 7 th Set of Interrogatories
32	Defendants' Answers to Plaintiff's 3 rd Set of Interrogatories
39	Subject Bottle
40	ProLaser Report
41	Chart by Witness William Hamlin (illustrative purposes only)
42	Photos of Rolfe Godfrey
49	Pre-Post Corks
49A	Photos of Pre-Post Corks
53	Chart by Witness William Hamlin (illustrative purposes only)
55	Empty Wine Bottle (illustrative purposes only)
56	Chart Diagram by Witness Eric Heiberg (illustrative purposes only)
57A	Video Deposition of Alan Thomas, MD (Part 1 of 2 unedited)
57B	Video Deposition of Alan Thomas, MD (Part 2 of 2 unedited)
57C	Video Deposition of Alan Thomas, MD (edited version on flash drive)
58	Photos of Rolfe Godfrey post first surgery
59	Photos of Rolfe Godfrey post second surgery
60	Photos of Rolfe Godfrey post third surgery
61	Photos of Rolfe Godfrey illustrating complex regional pain syndrome
62	Photo of Rick Bayer's equipment
63	Photo of Rick Bayer's equipment
66	Photo of Rick Bayer's equipment
67	Photo of Rick Bayer's equipment
505	Photographs and Drawings attached to 1/13/14 Bayer Report (illustrative purposes only)

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Ex. #	Description
505A	Post Board of DEX 505 drawings (illustrative purposes only)
507	Digital Photographs (Bayer Dep Exh 22)
516	Verallia Product Specifications
517	Bottle Diagram
543	Olive Garden Employee Roster (Godfrey Dep Ex 2, Darden 000033-36)
544	Time Records (Godfrey Dep Exh. 11, Darden 000814)
546	Summary of H&R Block Earning 2006-2013 (Godfrey Dep Exh. 12)
546A	Summary of H&R Block Earning 2006-2013 (Godfrey Dep Exh. 12) with annotations (illustrative purposes only)
550	Spreadsheet – Data Used in Claim Preparation (illustrative purposes only)
551	Spreadsheet – Historical Earnings (illustrative purposes only)
552	Spreadsheet – Historical New Discount Rate – Employment Compensation (illustrative purposes only)
553	Spreadsheet – Loss of Earnings Assuming Mr. Godfrey is Able to Return to Full Time Work (illustrative purposes only)
554	Spreadsheet – Cost of Future Life Care Plan (illustrative purposes only)
554A	Spreadsheet – Cost of Future Life Care Plan (illustrative purposes only)
558	Bookkeeping, Accounting and Audit Clerks Job Posting (illustrative purposes only)
566	Chart – Past Wage Loss, Future Wage Loss, Retraining LCP (illustrative purposes only)
568	Handwritten Letter from Kirstine Godfrey dated 12/21/12
569	Accident Report Form
570	Printout from H&R Block Listing Job Tasks List of Plaintiff
571	Printout of Darden Information re Plaintiff's Paystubs
572	Summary of Rolfe Godfrey's Hours from 2009 Darden Earning Statements (illustrative purposes only)
574	Photograph of Ripple Mark (illustrative purposes only)

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Ex. #	Description
575	Photograph of Internal Pressure Break Pattern (illustrative purposes only)
576	Photograph of Contract Damage (illustrative purposes only)
577	Photograph of a "J" Crack (illustrative purposes only)
578	Unopened Bottle of Ste Michelle Riesling (illustrative purposes only)
579	Single Lever Corkscrew Bottle Opener (illustrative purposes only)
580	Blank Piece of Lined Paper (illustrative purposes only)
583	Flash Drive of Optical Comparator Video Excerpt
584	Centering Cone (illustrative purposes only)
586	Olive Garden Timesheet Clock In/Out
612	Dr. Alan Thomas Medical Records
613	Letter from L. Phillips to Dr. Alan Thomas dated 7/9/2010 re Job Analysis
614	Letter from Dr. William Wagner to Dr. Alan Thomas dated 8/23/2011
615	Letter from Case Manager (Helmsman Management Services LLC) to Dr. Alan Thomas dated 10/28/2011

STATUTES

OF THE

TERRITORY OF WASHINGTON:

WITH THE CODE PASSED BY THE

LEGISLATIVE ASSEMBLY,

AT THEIR FIRST SESSION BEGUN AND HELD AT
OLYMPIA, FEBRUARY 28TH, 1854.

ALSO CONTAINING

THE DECLARATION OF INDEPENDENCE, THE CONSTITUTION OF
THE UNITED STATES, THE ORGANIC ACT OF WASHING-
TON TERRITORY, THE DONATION LAWS, &c. &c.

PUBLISHED BY AUTHORITY.

OLYMPIA:
GEO. D. GOODY, PUBLIC PRINTER.

1855.

with her except where the action is between her husband and herself, when she may sue and be sued alone.

SEC. 6. When an infant is a party, he shall appear by guardian, and if he has no guardian, or in the opinion of the court, the guardian is an improper person, the court shall appoint one to act.

SEC. 7. The guardian shall be appointed as follows :

1st. When the infant is plaintiff, upon the application of the infant, if he be of the age of fourteen years; or if under that age, upon the application of a relative or friend of the infant.

2d. When the infant is dependant, upon an application of the infant, if he be of the age of fourteen years, and apply on the first day of the return term of the summons; if he be under the age of fourteen, or neglect to apply, then upon the application of any other party to the action, or of a relative or friend of the infant.

SEC. 8. All persons interested in the cause of action, or necessary to the complete determination of the questions involved, shall, unless otherwise provided by law, be joined as plaintiffs, when their interest is in common with the party making the complaint; and as defendants, when their interest is adverse to the plaintiff: *Provided*, That where good cause exists, which shall be made to appear in the complaint, why a party who should be a plaintiff cannot, from a want of consent on his part or otherwise, be made such complainant, he shall be made a defendant.

SEC. 9. When the question is one of common or general interest to many persons, or where the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole.

SEC. 10. Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them, be included in the same action, at the option of the plaintiff.

SEC. 11. No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue, but the court may, on motion, allow the action to be continued by or against his representatives or successor in interest.

SEC. 12. A defendant against whom an action is pending upon a contract, or for specific, real or personal property, may, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person, and the adverse party apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of

the debt, or delivering the property, or its value, to such person as the court may direct; and the court may, in its discretion, make the order.

II. OF VENUE.

SEC. 13. What actions must be commenced in the county where the subject of the action is situated.

14. What actions must be tried in the county where the cause of action arose.
15. All other cases to be tried where summons is served ; proviso.

SEC. 13. Actions for the following causes shall be commenced in the county in which the subject of the action, or some part thereof, is situated.

1st. For the recovery of, for the possession of, for the partition of, for the foreclosure of a mortgage, on or for the determination of all questions affecting the title, or for any injuries to real property.

2d. All questions involving the rights to the possession or title to any specific article of personal property ; in which last mentioned class of cases, damages may also be awarded for the detention and for injury to such personal property.

SEC. 14. Actions for the following causes, shall be tried in the county where the cause, or some part thereof, arose :

1st. For the recovery of a penalty or forfeiture imposed by statute ; except that when it is imposed for an offense committed on a lake, river or other body of water, situate in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed.

2d. Against a public officer or person specially appointed to execute his duties for an act done him in virtue of his office ; or against a person, who by his command, or in his aid, shall do any thing touching the duties of such officer.

SEC. 15. In all other cases the action shall be tried in the county in which the defendant may be served with process : *Provided*, That in cases where there are two or more persons jointly liable, action may be commenced in the county where one or more of the defendants may be found, and process may issue for the other defendants to any other county in the territory : *Provided*, also, that nothing contained in any of the foregoing sections shall be so construed as to prevent a change in the place of trial as may be provided by law.

III. OF CHANGE OF VENUE.

SEC. 16. When a change of venue may be had.

17. Change of venue may be granted in vacation.
Neither party entitled to a second change of venue.
Escape in certain cases.

- SEC. 18. When change of venue is ordered in vacation, affidavit and order for change to be filed.
19. When change of venue is made duties of the clerk in relation thereto.
20. The costs of a change of venue to be paid by the party applying, before papers are transferred; proviso.
21. When an order for a change of venue may be annulled.
22. When a transcript has been filed, the case to be proceeded with as if it originated in that court.

SEC. 16. A change of venue, or the place of trial, may be had on the application of either of the parties in the following cases:

1st. When the county in which the action is pending shall be a party thereto, or interested therein;

2d. When the judge shall be interested in the action, or connected by blood or affinity with any person so interested, nearer than in the fourth degree;

3d. When the party applying for such change shall make and file an affidavit, stating that the judge or the inhabitants of the county are so prejudiced against him, that he cannot expect an impartial trial, and also, that the application for the change of venue is not made for the purpose of delay;

4th. When the county designated in the complaint is not the proper county, and the defendant appears and moves for the change to the proper county.

SEC. 17. An application for the change of venue may be made either to the court, in term time, or to a judge thereof, in vacation, and the change shall be to the most convenient county, to which there shall be no exception of the character of those above enumerated; but neither party shall be entitled to more than one change of venue, except for causes not in existence, or not known to the party, when the first change may have been taken: *Provided*, That where an application for a change of venue is made in vacation, reasonable notice shall be given to the adverse party, or his attorney, of the time and place, when and where such application shall be made.

SEC. 18. If the change of venue be ordered by the judge in vacation, he shall immediately transmit to the clerk of the court where the cause is pending, the affidavit, if any, and the order for the change, who shall file the same in his office.

SEC. 19. In such cases, as well as where the order shall be made in open court, the clerk shall forthwith transmit to the clerk of the proper court a transcript of the record and proceedings in such cause, with all the original papers filed therein, having first made out and filed in his own office, authenticated copies of all such original papers.

SEC. 20. The costs of such change of venue shall be paid by the appli-

cant therefor, and not taxed as part of the costs of the case; and the clerk shall require payment of such costs before the transcript and papers shall be transmitted as aforesaid. When the application for a change of venue is made at the term of court at which the cause stands for trial, the fees and cost of such witnesses as are in attendance upon a subpoena, shall be taxed and paid as a part of the costs of the change of venue: *Provided*, That where a change is allowed at a term after an unsuccessful trial of said cause, or where the party, ten days or more, prior to said term, or before the issuing or service of any subpoena of the opposite party, has given to the said party notice of his intention to apply for such change, it shall be discretionary with said court or judge to order what portion if any, of such costs and fees shall be taxed as a part of the costs of changing the venue.

SEC. 21. If such transcript of the record and proceedings be not transmitted to the clerk of the proper court, within twenty days after the order for the change of venue shall be filed, (unless a longer time be allowed by the judge,) such order may, on motion of the opposite party, be annulled by the court or judge who made the same, and in such case, no other change of venue shall be allowed to such applicant.

SEC. 22. Upon filing such transcript and papers in the office of the clerk of the court to which the same were certified, the cause shall be docketed, and the same proceedings had as though it had originated in that court.

IV. THE MANNER OF COMMENCING CIVIL ACTIONS.

- SEC. 23. How civil actions may be commenced.
24. Clerk's duty when complaint is filed.
25. When summons returnable.
26. What the summons shall be.
27. Summons, by whom served, and return thereof.
28. How a summons may be served.
29. When a service of a summons may be made by publication.
30. How service of a summons may be made by publication.
31. Rights of defendant when service is made by publication.
32. When summons may be re-issued.
33. When one of the parties to a suit cannot be served, the others may be proceeded against.
34. What shall be proof of the service of a summons.
35. The court to control proceedings after service of summons.

SEC. 23. Civil actions, in the several district courts of this territory, shall be commenced by the filing the complaint with the clerk of the court, and the issuing of a summons thereon, except as hereinafter provided.

SEC. 24. The clerk shall file the complaint in his office, endorsing thereon the day, month, and year when it is filed, and shall forthwith issue, under the seal of the court, summons against all the defendants named, in

EMORY E. HESS

REMINGTON & BALLINGER'S

ANNOTATED

CODES AND STATUTES

OF WASHINGTON

(CITE REM. & BAL. CODE)

SHOWING ALL
STATUTES IN FORCE, INCLUDING THE EXTRAORDINARY SESSION LAWS OF
1909.

BY

HON. RICHARD A. BALLINGER,

Secretary of the Interior, Ex-Judge of the Superior Court, Author of "Ballinger on Community Property," etc.

AND

HON. ARTHUR REMINGTON,

Reporter of the Supreme Court, Author of "Notes on Washington Reports," "Remington's Washington Digest," etc.

VOLUME I.

CODES OF PROCEDURE.

BANCROFT-WHITNEY COMPANY,

[TITLE II

3, § 51; L. '75, H. C., § 161.]

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CHAP. V]

VENUE OF ACTIONS.

§§ 209, 210

the ground of accident and surprise: Sea- ton v. Cook, 45 Wash. 27.

A party entitled to a change of venue under this section, because sued in a county other than that of his residence, does not, after having made proper demand for change, waive his right thereto by failing to appear at the time a ruling is had upon his application: State v. Superior Court, 15 Wash. 366.

Where it appears from defendant's affidavit of merits for removal of a cause that he is entitled to file an answer which will raise issues for trial, the affidavit is sufficient: Allen v. Superior Court, supra.

The application for transfer, made by all the defendants who had been served at the time, is not objectionable because

of the fact, before its determination, another defendant is served, but has failed to join therein: Id.

Where a motion for transfer has been made, upon a sufficient affidavit, the failure of applicant to appear at the time set for hearing of the motion affords no ground for denying the same: Id.

Where all the defendants live in another county it is a matter of right to have their motion for change of venue granted: Smith v. Allen, 18 Wash. 1. A motion for change of venue is too late if interposed at close of plaintiff's case, notwithstanding the case as to the only resident defendant was then dismissed, there being no showing that he was made a party in bad faith: Rector v. Thompson, 26 Wash. 400.

§ 209. (4857.) Grounds Authorizing Change of Venue.

The court may, on motion, in the following cases, change the place of trial, when it appears by affidavit or other satisfactory proof,—

1. That the county designated in the complaint is not the proper county; or
2. That there is reason to believe that an impartial trial cannot be had therein; or
3. That the convenience of witnesses or the ends of justice would be forwarded by the change; or

4. That from any cause the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he is a party, or in which he is interested; when he is related to either party by consanguinity or affinity within the third degree; when he has been of counsel for either party in the action or proceeding. [Cf. L. '54, p. 134, § 16; L. '69, p. 13, § 52; L. '75, p. 6, § 8; L. '77, p. 12, § 52; Cd. '81, § 51; 2 H. C., § 163.]

See infra, §§ 2018, 2019, change of venue in criminal cases.

Cited in 2 Wash. 120; 3 Wash. 695; 10 Wash. 149; 19 Wash. 13; 40 Wash. 446.

As to grounds for change in venue, see 2 Remington's Digest, pp. 2845-2847, §§ 10-24.

A change of place of trial, on account of local prejudice, rests solely in the discretion of the court. It may, of its own motion, examine as to public feeling, and properly make inquiry of the jurors touching the same: Ward v. Moorey, 1 W. T. 104.

This section should be liberally construed so far as same pertains to an impartial trial, convenience and justice: State ex rel. Wyman, Partridge & Co. v. Superior Court, 40 Wash. 443.

A motion for a change of venue on the ground that the convenience of witnesses and ends of justice would be forwarded thereby is addressed to the discretion of the court, and where such discretion has not been abused, the order of the court

denying the motion will not be disturbed: State v. Superior Court, 9 Wash. 673. See, also, State v. Straub, 16 Wash. 111.

Although a judge may be disqualified under subdivision 4 of this section, he is, nevertheless, authorized to grant a change of venue, and may approve an agreement of the parties for the appointment of a judge pro tempore: State v. Sachs, 3 Wash. 691.

Where the judge is interested financially in the result of a case, although it may not render him legally responsible, and is biased in favor of one of the parties, his failure to grant a change of venue is an abuse of discretion: Burnett v. Ashmore, 5 Wash. 163.

A judge is disqualified if he has pre- judged the case: State ex rel. Barnard v. Board, 19 Wash. 8. But the interest of a county does not disqualify the county commissioners from determining a contest over the establishing of a drain: O'Connell v. Baker, 35 Wash. 376.

§ 210. (4858.) To What Venue Changed—Only One Allowed.

If a motion for a change of the place of trial be allowed, the change shall be made to the county where the action ought to have been commenced, if it

be for the cause mentioned in subdivision one of the last preceding section, and in other cases to the most convenient county where the cause alleged does not exist. Neither party shall be entitled to more than one change of the place of trial, except for causes not in existence when the first change was allowed. [L. '69, p. 14, § 53; L. '77, p. 12, § 53; Cd. '81, § 52; 2 H. C., § 164.]

§ 211. (4859.) **Change to Newly Created County.**

Any party in a civil action pending in the superior court in a county out of whose limits a new county, in whole or in part, has been created, may file with the clerk of such superior court an affidavit setting forth that he is a resident of such newly created county, and that the venue of such action is transitory, or that the venue of such action is local, and that it ought properly to be tried in such newly created county; and thereupon the clerk shall make out a transcript of the proceedings already had in such action in such superior court, and certify it under the seal of the court, and transmit such transcript, together with the papers on file in his office connected with such action, to the clerk of the superior court of such newly created county, wherein it shall be proceeded with as in other cases. [Cf. L. '54, p. 377, § 2; L. '69, p. 14, § 54; L. '77, p. 12, § 54; Cd. '81, § 53; L. '91, p. 72, § 2; 2 H. C., § 165.]

§ 215. (4860.) **Transmission of Record on Change—Costs.**

When an order is made transferring an action or proceeding for trial, the clerk of the court must transmit the pleadings and papers therein to the court to which it is transferred. The costs and fees thereof, and of filing the papers anew, must be paid by the party at whose instance the order was made, except in the cases mentioned in subdivision one, section 209, in which case the plaintiff shall pay costs of transfer. The court to which an action or proceeding is transferred has and exercises over the same the like jurisdiction as if it had been originally commenced therein. [L. '69, p. 14, §§ 55, 56; L. '75, p. 7, § 10; L. '77, p. 12, § 55; Cd. '81, § 54; 2 H. C., § 166.]

See notes to § 208, supra.

Cited in 25 Wash. 348. on leave of the court of another county
Under this section, an information is to which the prosecution has been trans-
amendable by the prosecuting attorney, ferred: State v. Lyts, 25 Wash. 347.

§ 216. (4861.) **Change by Stipulation.**

Notwithstanding the provisions of section 209, all the parties to the action by stipulation in writing or by consent in open court entered in the records may agree that the place of trial be changed to any county of the state, and thereupon the court must order the change agreed upon. [L. '77, p. 13, § 56; Cd. '81, § 55; 2 H. C., § 167.]

As to sufficient stipulation showing parties had agreed to change of venue, see Kane v. Kane, 35 Wash. 517.

§ 217. (4862.) **Effect of Neglect of Moving Party.**

If such papers be not transmitted to the clerk of the proper court within the time prescribed in the order allowing the change, and the delay be caused by the act or omission of the party procuring the change, the adverse party, on motion to the court or judge thereof, may have the order vacated, and thereafter no other change of the place of trial shall be allowed to such party. [Cf.

L. '54, p. 135
C., § 168.]

See notes to

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See general:
L. '59, pp. 8-11
L. '77, pp. 13-1:
See infra, §
See infra, §:

Cited in 10
Wash. 629; 20
27 Wash. 249,
Wash. 621; 34
40 Wash. 522;
See 2 Remin;
§§ 1-10.

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By JUDICIARY COMMITTEE.

Senate Bill No. 230

STATE OF WASHINGTON, TWELFTH REGULAR SESSION.

February 15, 1911, read first and second time, ordered printed, and placed on general file.

AN ACT

Relating to the disqualification of judges of the superior courts, and providing change of venue or change of judges on account thereof.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. No judge of a superior court of the State of Washington shall sit to hear or try
2 any action or proceeding when it shall be established as hereinafter provided, that such judge is
3 prejudiced against any party or attorney, or the interest of any party or attorney appearing in
4 such cause. In such case the presiding judge shall forthwith transfer the action to another depart-
5 ment of the same court or call in a judge from some other court, or apply to the governor to
6 send a judge, to try the case; or, if the convenience of witnesses or the ends of justice will not
7 be interfered with by such course, and the action is of such a character that a change of venue
8 thereof may be ordered, he may send the case for trial to the most convenient court.

SEC. 2. Any party to or any attorney appearing in any action or proceeding in a superior
2 court, may establish such prejudice by motion supported by affidavit that the judge before whom
3 the action is pending is prejudiced against such party or attorney, so that such party or attorney
4 cannot, or believes that he cannot, have a fair and impartial trial before such judge: *Provided*
5 *further*, That no party or attorney shall be permitted to make more than one application in any
6 action or proceeding under this act.

SEC. 3. This act shall take effect March 11, 1911.

SENATE JOURNAL

OF THE

TWELFTH LEGISLATURE

OF THE

STATE OF WASHINGTON

BEGUN AND HELD AT

OLYMPIA, THE STATE CAPITAL

JANUARY 9, 1911

Adjourned Sine Die, March 9, 1911

W. H. PAULHAMUS, PRESIDENT

WM. T. LAUBE, SECRETARY

OLYMPIA, WASH.:
E. L. BOARDMAN, PUBLIC PRINTER

1911

Absent or not voting were: Senators Espy, Hewitt, Huxtable, Jackson, Landon, Ruth, Stewart, Whalley—8.

Senate bill No. 147, by Senator Metcalf, entitled "An act relative to legal holidays and declaring the 12th day of October of each year a legal holiday to be known as "Columbus Day," was read the third time.

The secretary called the roll on final passage of Senate bill No. 147, and it failed to pass the Senate by the following vote:

Those voting aye were: Senators Allen (F. J.), Bryan, Collins, Cox, Falconer, Hall, Hammer, Hutchinson, Jensen, Metcalf, Myers, Piper, Roberts, Rosenhaupt, Rydstrom, Shaefer, Smithson, Stevenson, White, Whitney—21.

Those voting nay were: Senators Anderson, Arrasmith, Bassett, Bowen, Brown, Chappell, Davis, Eastham, Fishback, Nichols, Ruth, Stephens, Troy—13.

Absent or not voting were: Senators Allen (P. L.), Espy, Hewitt, Huxtable, Jackson, Landon, Stewart, Whalley—8.

Senate bill No. 230, by Committee on Judiciary, entitled "An act relating to the disqualification of judges of the superior courts, and providing change of venue or change of judges on account thereof," was read third time.

Senator Bryan moved to strike section 3.

The motion carried.

The secretary called the roll on final passage of Senate bill No. 230, and it passed the Senate by the following vote:

Those voting aye were: Senators Allen (F. J.), Anderson, Arrasmith, Bassett, Bowen, Brown, Bryan, Chappell, Collins, Cox, Davis, Eastham, Espy, Falconer, Hall, Hammer, Hutchinson, Jensen, Metcalf, Myers, Nichols, Piper, Roberts, Rosenhaupt, Ruth, Rydstrom, Shaefer, Smithson, Stephens, Troy, White, Mr. President—32.

Those voting nay were: Senators Fishback, Stevenson—2.

Absent or not voting were: Senators Allen (P. L.), Hewitt, Huxtable, Jackson, Landon, Stewart, Whalley, Whitney—8.

There being no objection, the title of the bill was ordered to stand as the title of the act.

SPECIAL ORDER.

The hour of 2:30 o'clock having arrived, the Senate proceeded to the consideration of substitute Senate bill No. 6, which was a special order for this hour.

The secretary read the third time sections 84 to 238, inclusive, of substitute Senate bill No. 6.

On motion of Senator Bassett, substitute Senate bill No. 6 was made a special order for 2:30 p. m. Thursday, February 23rd.

On motion of Senator Falconer, the rules were suspended and the Senate returned to the introduction of bills.

INTRODUCTION OF BILLS.

Senate bill No. 313, by Appropriations Committee, entitled "An act making appropriations for maintenance of and sundry expenses at the various state institutions, schools and state offices and for the sundry civil expenses of the state government for the fiscal term beginning April 1, 1911, and ending March 31, 1913, except as otherwise provided."

The bill was read the first time, and on motion of Senator Falconer, the rules were suspended, the bill was read the second time by title, ordered printed and placed on general file.

Senator Rosenhaupt moved that the Senate recede from its amendment to the title of House bill No. 113.

The secretary called the roll, and the Senate receded from its amendment to the title of House bill No. 113 by the following vote:

Those voting aye were: Senators Allen (F. J.), Arrasmith, Bassett, Bowen, Brown, Bryan, Chappell, Collins, Cox, Davis, Eastham, Espy, Falconer, Fishback, Hall, Hammer, Hutchinson, Jensen, Metcalf, Myers, Nichols, Roberts, Rosenhaupt, Ruth, Rydstrom, Shaefer, Smithson, Stephens, Stevenson, Stewart, Troy, Mr. President—32.

Those voting nay were: Senators Anderson, Huxtable—2.

Absent or not voting were: Senators Allen (P. L.), Hewitt, Jackson, Landon, Piper, Whalley, White, Whitney—8.

CHAPTER 121.

[S. B. 230.]

RELATING TO DISQUALIFICATION OF JUDGES OF SUPERIOR COURTS.

AN ACT relating to the disqualification of judges of the superior courts, and providing change of venue or change of judges on account thereof.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. No judge of a superior court of the State of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the case; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court.

[Sec §§ 200-210, Rem.-Bal.]

Prejudice established.

Order change of venue.

SEC. 2. Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: *Provided, further,* That no party or attorney shall be permitted to make more than one application in any action or proceeding under this act.

[Sec §§ 200-210, Rem.-Bal.]

Establish by affidavit

Passed by the Senate February 21, 1911.

Passed by the House March 9, 1911.

Approved by the Governor March 18, 1911.

RESOLUTIONS AND MEMORIALS FOR WHICH

NO COPIES ARE INCLUDED HEREIN

SENATE JOINT RESOLUTIONS:

No. 3. By Committee on Rules and Joint Rules

Relating to the matters to be considered during the Nineteenth Session of the Legislature and the date of adjournment thereof.

Read first and second time January 21, and under suspension of rules, was adopted by the senate.

No. 4. By Committee on Rules and Joint Rules

Relating to the time of adjournment of the Nineteenth Legislature.

Read first and second time February 6, and placed on general file.

No. 5. By Committee on Commerce and Manufactures

Endorsing the "Pacific Northwest Commercial and Industrial Exposition" to be held in the spring of 1926 in New York City.

Read first and second time February 6, and placed on general file.

No. 6. By Committee on Rules and Joint Rules

Providing for the appointment of a joint sub-committee to employ an attorney to examine the statute law and to prepare bills repealing such statutes as should be repealed or revised.

Read first and second time February 10, and placed on general file.

No. 7. By Committee on Appropriations

Permitting introduction of a Senate Joint Resolution.

Read first and second time February 13, and under suspension of the rules was adopted by the Senate.

SENATE CONCURRENT RESOLUTIONS:

No. 1. By Senator Hastings

Relating to the appointment of a joint committee to draft joint rules for the 1925 Session of the Legislature

Read first and second time January 20, and under suspension of rules was placed on final passage

FIFTY-FOURTH DAY.

AFTERNOON SESSION.

SENATE CHAMBER,

OLYMPIA, WASH., Friday, January 1, 1926.

The Senate was called to order at 2 o'clock p. m., by President Johnson pursuant to adjournment.

Rev. O. F. Krieger of the First Methodist Episcopal Church, of Olympia offered prayer.

The Secretary called the roll, all members being present except Senators Grass, Hurn, Lunn, St. Peter and Wray, who were excused.

On motion of Senator Murphy, the reading of the journal of the previous day was dispensed with, and it was approved.

On motion of Senator Morris, the Secretary was instructed and authorized to send to Senator Wray a suitable bouquet of flowers with the greetings and best wishes for his speedy recovery and much happiness for the new year.

The Secretary read:

HOUSE CONCURRENT RESOLUTION No. 8.

By Committee on Rules and Order: "Relating to a joint session for the purpose of holding memorial services."

The Resolution was read first time by title, and on motion of Senator Landon the rules were suspended, the Resolution read second time by title, read third time and adopted.

The Secretary read:

HOUSE CONCURRENT RESOLUTION No. 9.

By Committee on Rules and Order: "Relating to the consideration of bills."

The Resolution was read first time by title, and on motion of Senator Metcalf the rules were suspended, the resolution read the second time by title, read the third time and adopted.

The Secretary read:

SENATE JOINT RESOLUTION No. 5.

By Senators Westfall, Palmer, Grass, Houser, Conyard, Post, Sutton, Oman, McCauley, Lunn, Christensen, Shaw, Myers, Morris, Smith and Somerville:

WHEREAS, under the provisions of Senate Joint Resolution No. 6 of the regular session of the 19th legislature numerous bills repealing obsolete laws and reviewing ambiguous statutes were presented to the present extraordinary session and substantially all of such bills have already been passed by both houses of the legislature and approved by the governor; and

WHEREAS, there was not sufficient time between the adjournment of the regular session and the convening of the extraordinary session to examine all of the statutes

for the purpose of preparing bills repealing or revising the same, and there are still on the statute books many laws that are manifestly obsolete or in need of revision:

Therefore Be It Resolved By the Senate and House of Representatives of the State of Washington,

That the joint subcommittee of three members of the rules and joint rules committee of the Senate and three members of the rules and order committee of the House of Representatives appointed under the provisions of Senate Joint Resolution No. 6 of the regular session of the 19th legislature be continued with the authority to employ a competent attorney experienced in the drafting of statutes, and a stenographer, and fix their compensation;

That such attorney shall during the time between the adjournment of the present extraordinary session of the legislature and the convening of the 20th biennial session of the legislature, examine as much of the statute law of this state as can be done in a thorough and pains-taking manner, for the purpose of determining which of such remaining statutes are obsolete and should be repealed and what portions thereof are conflicting, ambiguous and contradictory and should be revised;

That said attorney shall prepare bills repealing or revising such statutes, as the case may be, and at the convening of the 20th biennial session of the legislature such of said bills as are approved by said joint subcommittee be introduced by the members of said committee in the Senate or the House respectively as the committee may determine, and ordered printed, and referred to the judiciary committee of the Senate or the House, as the case may be;

That said attorney be provided with the necessary furniture, supplies, stationery and postage and that in addition to the compensation of said attorney and stenographer they receive their actual traveling and other expenses in visiting Olympia for the purpose of conferring with state officers in regard to the revision of statutes relating to their departments respectively;

That the compensation of said attorney and stenographer and necessary expenses for furniture, supplies, stationery and postage and necessary expenses incurred in visiting Olympia be paid out of the moneys appropriated for the expenses of the legislature upon vouchers signed and approved by the president of the Senate and the speaker of the House of Representatives.

The resolution was read the first time, and on motion of Senator Westfall the rules were suspended, the resolution was read the second time by title, read the third time and placed on final passage.

The Secretary called the roll on the final passage of Senate Joint Resolution No. 6 and it was adopted by the following vote:

Those voting aye were: Senators Barclay, Barnes, Bishop, Carlyon, Christensen, Cleary, Condon, Conner, Conyard, Davis, Groff, Hall, Harrison, Hastings, Houser, Jacobson, Karshner, Kirkman, Landon, McCauley, Metcalf, Morgan, Morris, Morthland, Murphy, Myers, Norman, Oman, Palmer, Post, Shaw, Smart, Smith, Somerville, Sutton, Westfall, Wilmer—37.

Absent or not voting: Senators Grass, Hurn, Lunn, St. Peter, Wray—5.

On motion of Senator Conner, the Secretary was instructed to immediately send a telegram to the University of Washington football team, wishing them success in their game against the University of Alabama at Pasadena, California.

The Secretary read:

REPORTS OF STANDING COMMITTEES.

SENATE CHAMBER,

OLYMPIA, WASH., January 1, 1926.

Mr. PRESIDENT:

We, your Committee on Insurance, to whom was referred House Bill No. 213, entitled "An act repealing Section 7328 of Remington's Compiled Statutes relating

IN THE SENATE.

By JOINT COMMITTEE ON REVISION OF LAWS.

Senate Bill No. 64

STATE OF WASHINGTON, TWENTIETH REGULAR SESSION.

January 10, 1927, read first and second time, ordered printed, and referred to
Committee on Judiciary.

AN ACT

Relating to the disqualification of judges of the superior courts, and providing for change of venue or change of judges on account thereof, and amending Chapter 121 of the Laws of 1911.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That Section 1 of Chapter 121 of the Laws of 1911, page 617 (Section 209-1 of Remington's Compiled Statutes; Section 8546 of Pierce's 1919 Code), be amended to read as follows:

Section 1. No judge of a superior court of the State of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the case; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court * * * : Provided, That in criminal prosecutions the case shall not be sent for trial to any court outside the county unless the accused shall waive his right to a trial by a jury of the county in which the offense is alleged to have been committed.

SEC. 2. That Section 2 of Chapter 121 of the Laws of 1911, page 617 (Section 209-2 of Remington's Compiled Statutes; Section 8547 of Pierce's 1919 Code), be amended to read as follows:

Section 2. Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: Provided, That such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion: And

13 provided, further, That no party or attorney shall be permitted to make more than one
 14 application in any action or proceeding under this act.

NOTE: We recommend the revision and amendment of Section 1 of Chapter 121 of the Laws of 1911 (Section 209-1 of R. C. S.; Section 8546 P. 19 C.), as indicated in the foregoing bill, for the reason that the supreme court in *State ex rel. Howard v. Superior Court of Pacific County*, 88 Wash. 344-347, held that under the provisions of Section 22 of Article I of the constitution the accused in a criminal prosecution has a constitutional right to be tried in the county in which the offense is alleged to have been committed and that although an accused may waive such right and does so when he asks a change of venue, the proceeding under the above statute "is not an application for a change of venue, but only an application of the accused to be tried before another judge, which, under our system of interchange of trial judges, can be readily accomplished without any change of venue. We do not think the accused is bound to waive his constitutional right of being tried in the county in which the offense is alleged to have been committed in order to avail himself of the right to challenge the resident presiding judge on account of his prejudice. In view of this positive constitutional guaranty, we feel constrained to construe the language of the Act of 1911, above quoted, as meaning no more than that the resident presiding judge may 'send the case for trial to the most convenient court' only when the accused expressly consents to be tried in a county other than the one 'in which the offense is alleged to have been committed'."

In *State ex rel. O'Phelan v. Superior Court of Pacific County*, 88 Wash. 669-674, the supreme court held that the judge against whom a motion and affidavit of prejudice had been filed, and which motion was allowed and the order entered granting a change of judge, in a criminal case, had no power to grant a change of venue to another county, even where the accused had previously filed a motion for a change of venue on the ground of local prejudice, the motion for a change of judges having been first presented to the presiding judge.

We recommend the revision and amendment of Section 2 of Chapter 121 of the Laws of 1911 (Sec. 209-2 R. C. S., Sec. 8547 P. 19 C.), as indicated in the foregoing bill for the reason that the provision inserted by way of amendment, in our opinion, expresses the latest rulings of the supreme court as to the proper construction of this statute. This statute has been before the supreme court many times and we have found some difficulty in reconciling its various decisions on the point of when a motion for change of judges must be made.

We respectfully submit for the consideration of the committee to which this bill is referred, a brief statement of the rulings made by the supreme court.

In *State ex rel. Lefebvre v. Clifford*, 65 Wash. 313, the court calls attention to the fact that the affidavit of prejudice was presented after a continuance had been asked by the petitioner and after orders in the case had been made by the judge. The court says:

"It is true that these orders were not made upon the merits of the case; but the statute does not, by any specific provision or by any intendment, limit the right to make the application at any time before the trial on the merits. If literally construed the right would exist at any time prior to the entering of the judgment. But to place such a construction on the law is to charge the law-making power with an intention to cripple and handicap the courts in their attempted enforcement of law, to an intolerable extent. We cannot conclude that it was intended by the act that a party could submit to the jurisdiction of the court by waiving his rights to object until by some ruling of the court in the case he becomes fearful that the judge is not favorable to his view of the case. In other words, he is not allowed to speculate upon what rulings the court will make on propositions that are involved in the case, and if the rulings do not happen to be in his favor, to then for the first time raise the jurisdictional question."

In *State ex rel. Jones v. Gay*, 65 Wash. 629, the court held that an affidavit of prejudice of the judge was timely where the accused was not represented by counsel at the time of the arraignment and plea when the cause was set for trial, and counsel made the motion at the time of their first appearance, shortly after learning that the trial had been set.

In *State ex rel. Farmer v. Bell*, 101 Wash. 133, the court held that where a party has asked for a jury trial, which the judge had denied, it was too late to file an affidavit of prejudice.

In *State ex rel. Dunham*, 106 Wash. 507, the court says:

"We have held that a party may not invite a ruling, and being dissatisfied, file a affidavit of prejudice. But we are not inclined to hold that an appearance by way of motion, demurrer or answer may not be contemporaneous with or be followed by an affidavit of prejudice, if the court has not theretofore made any ruling that may be said to go to the merits of the case."

In *State ex rel. Mead v. Superior Court*, 108 Wash. at page 638, the court says:
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the application at his first appearance in the cause; that he must move before the judge presiding has made an order or a ruling involving discretion, as to hold otherwise would be to hold that the application could be made at any stage of the proceedings" citing the *Lefebvre* case, *supra*.

In *State ex rel. Davis v. Superior Court*, 114 Wash. at page 339, the court says:

"A motion for a change of judges supported by an affidavit of prejudice, is timely if filed and called to the attention of the court before it has made any ruling whatsoever in the case, either on the motion of the party making the affidavit or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, otherwise it is not timely made."

In *State v. Clark*, 125 Wash. 294, the facts are as follows: An information was filed on November 20, 1921; on December 2, 1921, the defendant was brought before the court and arraigned, at which time he plead not guilty and his bond was fixed in the sum of \$1,500. On December 20, the prosecuting attorney served notice on the defendant's counsel that on December 31st he would move the court to set the case for trial. On December 23rd, eight days before the time so noted for setting the case for trial, appellant served upon the prosecuting attorney and filed his affidavit of prejudice against the resident judge, moving for a change of judge and noted the motion for hearing on the day the prosecuting attorney had noted for hearing his motion to set the case for trial. On that day a motion for change of judge was made and overruled and the case was set for trial and subsequently tried before the judge against whom appellant's affidavit of prejudice had been filed. The court says:

"The question before us is whether the situation disclosed by the record in this case is one that comes within the operation of the rule as announced in the *Davis* case, 114 Wash. 335, *supra*. As we have already indicated, the court has deviated somewhat from the literal reading of the statute in order to establish a workable procedure, and having done that, it ill behooves the court to then proceed to modify the rule so that new confusion is introduced into the practice. We are determined to abide by the established rule and are satisfied that the facts in this case fall within it. When the defendant is called before the court for arraignment, the judge is then required either to make a ruling or exercise his discretion. It is unnecessary to detail the numerous situations that might arise upon such an occasion which would call for the court's action, and although in this case all that the court did was to fix bail (which might have been fixed *ex parte* before the arrest was made) and receive the plea of not guilty, still, the question of whether the affidavit was timely presented is not a question of what actually took place, but of what might have occurred. In the interest of orderly procedure and conformity to the rule heretofore announced, we hold that the affidavit of prejudice should have been filed before the arraignment."

We are frank to admit that we are utterly unable to reconcile the holding in the *Clark* case, 125 Wash. *supra*, with the rule laid down in the *Davis* case, 114 Wash. *supra*, which seems to us to state that the application for a change of judge must be made before the court has made any ruling upon a motion of either party, but we are inclined to think that the ruling in the *Clark* case does conform to the holding in *Ex rel. Mead*, 108 Wash., *supra*, and we have therefore prepared the amendment in the form of a combination of the rule laid down in the *Mead* case with that laid down in the *Clark* case.

We wish, however, to call the attention of the committee to which this bill is referred, to the language of the statute relating to this subject from the State of Montana, some features of which appear to us to be worthy of consideration in the interest of making definite and certain the time when an affidavit of prejudice on the part of a judge must be filed.

The Montana statute in this respect is as follows:

"Any judge * * * must not sit or act as such in any action or proceeding:

4. When either party makes or files an affidavit as hereinafter provided, that he has reason to believe, and does believe, he cannot have a fair and impartial hearing or trial before a district judge by reason of the bias or prejudice of such judge * * * upon the filing of the affidavit the judge as to whom said disqualification is averred, shall be without authority to act further in the action, motion or proceeding, but the provisions of this section do not apply to the arrangement of the calendar, the regulation of the order of business, the power of transferring the action or proceeding to some other court, nor to the power of calling in another district judge, to sit and act in such action or proceeding * * *"

The provisions of the underscored portion of the statute of Montana quoted above appear to us to be reasonable, particularly that relating to the arrangement of the calendar and the regulation of the order of business, and we are of the opinion also that there is no valid reason why the arraignment and fixing of bail in a criminal case should not be excluded from the operation of the statute. The arrangement of the calendar, the setting of cases down for trial, the arraignment of accused persons and fixing their bail, although among the duties of a judge, are to all practical intents and purposes administrative rather than judicial acts and with the possible exception of setting a date for trial and fixing bail, where the parties disagree,

call for the exercise of no discretion even, on the part of the judge. But even assuming that in setting a date for trial or fixing bail a judge should so act as to lead the disappointed party to believe that he cannot have a fair trial before such judge, would it not be more in accordance with our ideas of justice to permit the filing of the affidavit of prejudice afterwards than to compel the party to go to trial before a judge in which he did not have confidence.

We respectfully suggest for the consideration of the committee to which this bill is referred an amendment to Section 2 of the foregoing bill as follows:

In line 8 of page 2 of the original bill, the same being line 12, page 1, of the printed bill, after the word "discretion" and before the ":" insert the following:

" , but the arrangement of the calendar, the regulation of the order of business, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso".

It appears to us that if our present statute be amended as provided in the foregoing bill in accordance with the latest rulings of the supreme court and further amended as above suggested, an orderly and definite procedure easy to be understood and followed by the bench and bar will be provided, which will save to litigants and their counsel all rights to which they are entitled in the matter of selecting the judge before whom they desire to try a case, and will put a stop to numerous cases being taken to the supreme court on the ground that the trial court has committed error in construing the statute.

Checked with statutes and/or decisions by Senators Palmer and Hastings, and Representatives Falknor and Soule.

IN THE SENATE

STATE OF

January 10, 1927

Relating to fees to be paid

Be it enacted by the Legislature

SECTION 1. That

2 repealed.

NOTE: We refer to the fees to be paid to the clerk of the court never been specifically repealed by Act No. 140 of the Laws of 1907, repealing clause either g

Checked with statutes and/or decisions by Senators Palmer and Hastings, and Representatives Falknor and Soule.

SENATE JOURNAL
OF THE
Twentieth Legislature
OF THE
STATE OF WASHINGTON

AT
Olympia, the State Capital

Convened January 10, 1927
Adjourned Sine Die, March 10, 1927



W. LON JOHNSON, President
RALPH METCALF, President Pro Tem.
VICTOR ZEDNICK, Secretary

OLYMPIA
JAY THOMAS, PUBLIC PRINTER
1927

13 of section 1 of the printed bill, same being line 19 of the original bill, word "husband" insert the words "or wife".

13 of Section 1 of the printed bill, same being line 20 of the original bill, words "no husband" and before the comma (,) insert the words "or wife".

14 of section 1 of the printed bill, same being line 21 of the original bill, word "mother" insert a comma (,) and the words "or husband or father,".

E. B. PALMER, *Acting Chairman.*

We concur in this report: Paul W. Houser, C. G. Heifner, W. G. Hartwell, Wray, Fred W. Hastings, Reba J. Hurn, Ralph Metcalf.

On motion of Senator Wray, the report of the committee was adopted. Mr. Carlyon was called to preside.

On motion of Senator Palmer, the committee amendments were adopted. The Secretary called the roll on the final passage of Senate Bill No. 52 and it passed the Senate by the following vote:

Those voting aye were: Senators Barclay, Barnes, Carlyon, Colburn, Landon, Hastings, Heifner, Hurn, Karshner, Kirkman, Lunn, McCauley, Morgan, Murphy, Myers, Norman, Palmer, Post, St. Peter, Shaw, Sutton, Williams, Wilmer, Wray—27.

Those absent or not voting: Senators Cleary, Condon, Conner, Finch, Hartser, Knutzen, Landon, Morthland, Oman, Smith, Somerville, Taylor, Westfall—14.

The bill, having received the constitutional majority, was declared passed. There being no objection, the title of the bill was ordered to stand as the title of the act.

The Secretary read:

REPORT OF STANDING COMMITTEE.

SENATE CHAMBER,
OLYMPIA, WASH., January 20, 1927.

MR. PRESIDENT:
We, your Committee on Judiciary, to whom was referred Senate Bill No. 61, an Act relating to the qualifications and justification of personal sureties, including Chapter IX of the Code of Washington Territory of 1881, have had under consideration, and we respectfully report the same back to the Senate with the recommendation that it do pass, with the following amendments:

In section 2 of the printed bill, same being line 12 of page 1 of the bill, after the word "shall" strike the word "be" and insert in lieu thereof "have separate property".

In section 2 of the printed bill, same being line 14 of page 1 of the bill, after the word "execution" strike the semi-colon (;) and insert in lieu thereof a comma (,) and the words "unless his wife join with him in the execution of, in which case they must have community property of such required".

E. B. PALMER, *Acting Chairman.*

We concur in this report: William Wray, Paul W. Houser, W. G. Hartwell, Hurn, C. G. Heifner, Homer L. Post, Fred W. Hastings, Ralph Metcalf.

On motion of Senator Palmer, the report of the committee was adopted. On motion of Senator Palmer, the committee amendments were adopted.

The Secretary called the roll on the final passage of Senate Bill No. 61 and it passed the Senate by the following vote:

Those voting aye were: Senators Barclay, Barnes, Carlyon, Colburn, Condon, Hall, Hartwell, Hastings, Heifner, Hurn, Karshner, Kirkman, Landon, McCauley, Metcalf, Morgan, Murphy, Myers, Norman, Oman, Palmer, Post, St. Peter, Shaw, Smart, Smith, Somerville, Sutton, Williams, Wilmer, Wray—27.

Absent or not voting: Senators Cleary, Condon, Conner, Houser, Knutzen, Landon, Morthland, Taylor, Westfall—9.

The bill, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

The Secretary read:

REPORT OF STANDING COMMITTEE.

SENATE CHAMBER,
OLYMPIA, WASH., January 18, 1927.

MR. PRESIDENT:

We, your Committee on Judiciary, to whom was referred Senate Bill No. 64, entitled "An Act relating to the disqualification of judges of the superior court, and providing for change of venue or change of judges on account thereof, and amending Chapter 121 of the Laws of 1911," have had the same under consideration, and we respectfully report the same back to the Senate with the recommendation that it do pass with the following amendment:

In line 12 of section 2 of the printed bill, same being line 8 of page 2 of the original bill, after the word "discretion" and before the colon (:) insert the following: A comma (,) and the following words "but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso".

In line 13 of section 2 of the printed bill, same being line 10 of page 2 of the original bill, after the word "one" insert the word "such".

E. B. PALMER, *Acting Chairman.*

We concur in this report: William Wray, Paul W. Houser, Ralph Metcalf, W. G. Hartwell, C. G. Heifner, Fred W. Hastings, Daniel Landon, Reba J. Hurn.

On motion of Senator Palmer, the report of the committee was adopted.

On motion of Senator Palmer, the committee amendments were adopted.

The Secretary called the roll on the final passage of Senate Bill No. 64 and it passed the Senate by the following vote:

Those voting aye were: Senators Barclay, Barnes, Carlyon, Colburn, Davis, Finch, Hall, Hartwell, Hastings, Heifner, Houser, Hurn, Karshner, Kirkman, Lunn, McCauley, Metcalf, Morgan, Murphy, Myers, Norman, Oman, Palmer, Post, St. Peter, Shaw, Smart, Smith, Sutton, Williams, Wilmer, Wray—32.

Absent or not voting: Senators Cleary, Condon, Conner, Knutzen, Landon, Morthland, Somerville, Taylor, Westfall—9.

The bill, having received the constitutional majority, was declared passed.

There being no objection, the title of the bill was ordered to stand as the title of the act.

The Secretary read:

REPORT OF STANDING COMMITTEE.

SENATE CHAMBER,
OLYMPIA, WASH., January 19, 1927.

MR. PRESIDENT:

We, your Committee on Judiciary, to whom was referred Senate Bill No. 81, entitled "An Act relating to awarding and setting off property of decedents to surviving spouses, and amending Section 103 of Chapter 156 of the Laws of 1917, and repealing a certain act," have had the same under consideration, and we respectfully report the same back to the Senate with the recommendation that it do pass with the following amendments:

Sale of
livestock
for charges.

Notice.

Section 1981. If said property consists of live stock, the maintenance of which at the place where kept is wasteful and expensive in proportion to the value of the animals, or consists of perishable property liable, if kept, to destruction, waste or great depreciation, the person, firm or corporation having such lien may sell the same upon giving ten days' notice.

Passed the Senate January 19, 1927.

Passed the House February 2, 1927.

Approved by the Governor February 16, 1927.

CHAPTER 145.

[S. B. 64.]

CHANGE OF VENUE OR OF JUDGES.

AN ACT relating to the disqualification of judges of the superior courts, and providing for change of venue or change of judges on account thereof, and amending Chapter 121 of the Laws of 1911.

Be it enacted by the Legislature of the State of Washington:

§ 1, Ch. 121,
L. 1911;
§ 209-1 Rem.
Stats.;
§ 8546,
Pierce's
1919 Code.

SECTION 1. That section 1 of chapter 121 of the Laws of 1911, page 617 (section 209-1 of Remington's Compiled Statutes; section 8546 of Pierce's 1919 Code), be amended to read as follows:

Judge
prejudiced.

Section 1. No judge of a superior court of the State of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause.

Transfer to
another
judge.

In such case the presiding judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the

case; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court: *Provided*, That in criminal prosecutions the case shall not be sent for trial to any court outside the county unless the accused shall waive his right to a trial by a jury of the county in which the offense is alleged to have been committed.

When
change of
venue.

Condition
for change
in criminal
prosecutions.

SEC. 2. That section 2 of chapter 121 of the Laws of 1911, page 617 (section 209-2 of Remington's Compiled Statutes; section 8547 of Pierce's 1919 Code), be amended to read as follows:

§ 2, Ch. 121,
L. 1911;
§209-2, Rem.
Stats.;
§ 8547,
Pierce's
1919 Code.

Section 2. Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or believes that he cannot, have a fair and impartial trial before such judge: *Provided*, That such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso: *And provided, further*, That no party or attorney shall be permitted to make more than one

Affidavit of
prejudice.

Time motion
and affidavit
must be
filed.

Only one
application.

such application in any action or proceeding under this act.

Passed the Senate January 21, 1927.

Passed the House February 2, 1927.

Approved by the Governor February 16, 1927.

CHAPTER 146.

[S. B. 65.]

CORPORATION FEES.

AN ACT relating to fees to be paid to the Secretary of State by corporations, and repealing Chapter LXX of the Laws of 1897.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That chapter LXX (70) of the Laws of 1897, pages 134-135, is hereby repealed.

Passed the Senate January 19, 1927.

Passed the House February 2, 1927.

Approved by the Governor February 16, 1927.

Statute
repealed.

CHAPTER 147.

[S. B. 66.]

VACANCIES IN THE OFFICE OF JUSTICES OF THE PEACE.

AN ACT relating to vacancies in the office of justices of the peace, and repealing certain acts in relation thereto.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That sections 1696 to 1701, both inclusive, of the Code of Washington Territory of 1881, are hereby repealed.

Passed the Senate January 19, 1927.

Passed the House February 2, 1927.

Approved by the Governor February 16, 1927.

Statutes
repealed.

REMINGTON'S
REVISED STATUTES
OF WASHINGTON

ANNOTATED

SHOWING ALL

STATUTES IN FORCE TO AND INCLUDING
THE SESSION LAWS OF 1931

BY

HON. ARTHUR REMINGTON

Reporter of the Supreme Court of the State of Washington, Author of
"Notes on Washington Reports," "Remington's Washington Digest,"
"Remington's Compiled Statutes of Washington," etc.

VOLUME II

CODES OF PROCEDURE

- TITLE I.—COURTS
- TITLE II.—PROCEDURE IN COURTS OF RECORD
- TITLE III.—ISSUES, TRIAL AND JUDGMENT
- TITLE IV.—ENFORCEMENT OF JUDGMENTS
- TITLE V.—PROVISIONAL REMEDIES

SAN FRANCISCO
BANCROFT-WHITNEY COMPANY
1932

to grant a change of venue in a local action, primarily triable in the home county of defendant, where due to local prejudice, the demands of justice justify the change: *North Bend Lum-Co. v. Seattle*, 147 Wash. 330, 266 Pac. 156.

Under this section, subd. 2, the court

is warranted in granting a change in an action against a city therein, owing to local prejudice in favor of the city: *Id.*

Weight of newspaper articles as evidence of prejudice against accused entitling him to change of venue. 18 Am. Cas. 789.

§ 209-1.* Prejudice of judge—Change of venue. No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the case; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court: Provided, that in criminal prosecutions the case shall not be sent for trial to any court outside the county unless the accused shall waive his right to a trial by a jury of the county in which the offense is alleged to have been committed. [L. '27, p. 128, § 1; L. '11, p. 617, § 1.]

Cited in 76 Wash. 461, 136 Pac. 678; 77 Wash. 9, 137 Pac. 304; 77 Wash. 632, 634, 138 Pac. 291; 78 Wash. 262, 138 Pac. 869; 78 Wash. 293, 139 Pac. 60; 82 Wash. 421, 422, 144 Pac. 539; 83 Wash. 87, 89, 145 Pac. 66; 87 Wash. 605, 152 Pac. 1; 88 Wash. 345, 346, 153 Pac. 7; 88 Wash. 370, 153 Pac. 372; 95 Wash. 511, 164 Pac. 62; 95 Wash. 647-653, 164 Pac. 198; 96 Wash. 36, 164 Pac. 595; 102 Wash. 275, 172 Pac. 1156; 106 Wash. 509, 510, 180 Pac. 481; 108 Wash. 637, 185 Pac. 628; 111 Wash. 283, 190 Pac. 321; 112 Wash. 573, 192 Pac. 935; 114 Wash. 338, 195 Pac. 26; 115 Wash. 186, 196 Pac. 651; 121 Wash. 612, 613, 209 Pac. 1097, 1098; 122 Wash. 40, 210 Pac. 675; 125 Wash. 56, 215 Pac. 44; 125 Wash. 296, 298, 216 Pac. 17, 18; 127 Wash. 102, 219 Pac. 862, 863; 131 Wash. 451, 230 Pac. 155; 137 Wash. 22, 241 Pac. 302; 139 Wash. 127, 128, 245 Pac. 930, 931.

Disqualification or prejudice of judge:
See *Remington's Digest*, Venue, § 18;
State ex rel. Nelson v. Yahey, 64

Wash. 511, 117 Pac. 265; *Bedolfe v. Bedolfe*, 71 Wash. 60, 127 Pac. 594; *State ex rel. Russell v. Superior Court*, 77 Wash. 631, 138 Pac. 291; *State v. Sefrit*, 82 Wash. 520, 144 Pac. 725; *State ex rel. Howell v. Superior Court*, 82 Wash. 356, 144 Pac. 291; *Cooper v. Cooper*, 83 Wash. 85, 145 Pac. 66; *State ex rel. Hammebohl v. Superior Court*, 85 Wash. 663, 149 Pac. 16; *State ex rel. Nixon v. Superior Court*, 87 Wash. 603, 152 Pac. 1; *State ex rel. O'Phelan v. Superior Court*, 88 Wash. 669, 163 Pac. 1078; *State ex rel. Swan v. Superior Court*, 95 Wash. 510, 164 Pac. 62; *State ex rel. Talcus v. Holden*, 96 Wash. 35, 164 Pac. 595; *State ex rel. Foster v. Superior Court*, 95 Wash. 647, 164 Pac. 198; *State ex rel. Sheehan v. Reynolds*, 111 Wash. 281, 190 Pac. 321; *State ex rel. Cody v. Superior Court*, 112 Wash. 571, 192 Pac. 935; *State ex rel. Davis v. Superior Court*, 114 Wash. 335, 195 Pac. 25; *State v. Vanderveer*, 115 Wash. 184, 196 Pac. 650; *State ex rel. Lindley v. Grady*, 116 Wash. 539, 199 Pac.

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980; State ex rel. Douglas v. Superior Court, 121 Wash. 611, 209 Pac. 1097; State ex rel. Nissen v. Superior Court, 122 Wash. 407, 210 Pac. 674; Howland v. Day, 125 Wash. 480, 216 Pac. 864; State v. Lindberg, 125 Wash. 51, 215 Pac. 41; State ex rel. Buttnick v. Superior Court, 127 Wash. 101, 219 Pac. 862; State ex rel. Carpenter v. Superior Court, 131 Wash. 448, 230 Pac. 154.

§ 20. Demand for change, consent or refusal, and time for demand: State ex rel. Cummings v. Superior Court, King County, 5 Wash. 518, 32 Pac. 451, 771; Rector v. Thompson, 26 Wash. 400, 67 Pac. 86; State ex rel. Lefebvre v. Clifford, 65 Wash. 313, 118 Pac. 40; State ex rel. Jones v. Gay, 65 Wash. 629, 118 Pac. 930; Bedolfe v. Bedolfe, 71 Wash. 60, 127 Pac. 594; State ex rel. Beeler v. Smith, 76 Wash. 460, 136 Pac. 678; Fortson Shingle Co. v. Skagland, 77 Wash. 8, 137 Pac. 304; State ex rel. Deavers v. French, 78 Wash. 260, 138 Pac. 869; State ex rel. Gourley v. Smith, 78 Wash. 292, 139 Pac. 60; Nance v. Woods, 79 Wash. 188, 140 Pac. 323; State ex rel. Stevens v. Superior Court, 82 Wash. 420, 144 Pac. 539; Cooper v. Cooper, 83 Wash. 85, 145 Pac. 66; State ex rel. Nixon v. Superior Court, 87 Wash. 603, 152 Pac. 1; State ex rel. Talens v. Holden, 96 Wash. 35, 164 Pac. 595; State ex rel. Poussier v. Superior Court, 98 Wash. 565, 168 Pac. 164; State ex rel. Farmer v. Bell, 101 Wash. 133, 172 Pac. 221; State ex rel. Dunham v. Superior Court, 106 Wash. 507, 180 Pac. 481; State ex rel. Mead v. Superior Court, 108 Wash. 636, 185 Pac. 628; State ex rel. Owen v. Superior Court, 110 Wash. 49, 187 Pac. 708; State ex rel. Davis v. Superior Court, 114 Wash. 335, 195 Pac. 25; State v. Vanderveer, 115 Wash. 184, 196 Pac. 650; State ex rel. Douglas v. Superior Court, 121 Wash. 611, 209 Pac. 1097; State v. Clark, 125 Wash. 294, 216 Pac. 17; Dodson, In re, 135 Wash. 625, 238 Pac. 610.

The determination of a guardian's

fees under Rev. Stat., § 1586, is not a new "proceeding" within the meaning of the statute authorizing a change of judges in any action or "proceeding," upon the filing of an affidavit of prejudice: *Leslie's Estate, In re*, 137 Wash. 20, 241 Pac. 301.

A stay of execution after sentence of death to determine whether the condemned has become insane since his trial and sentence, is not "an action or proceeding" within this section; since a court may control its own execution and it is a matter directed to the conscience and discretion of the judge: State ex rel. Alfani v. Superior Court, 139 Wash. 125, 245 Pac. 929.

An application for a change of venue on account of the prejudice of a judge must be made at the party's first appearance in the cause before a ruling involving discretion; and the submission of a will to probate and issuance of letters testamentary thereon waives the right on a subsequent application to revoke the letters issued and appoint an administrator: State ex rel. Norris v. Reynolds, 154 Wash. 232, 281 Pac. 998.

Hearing and determination: See *Remington's Digest, Venue*, § 22; *Ward v. Moorey*, 1 W. T. 104; State ex rel. Nelson v. Yakey, 64 Wash. 511, 117 Pac. 265; State ex rel. McWhorter v. Superior Court, 112 Wash. 574, 192 Pac. 903.

The court may, where an investigation is necessary, continue the cause until such times as the investigation may be properly made: State ex rel. Giles v. French, 102 Wash. 273, 172 Pac. 1156.

Having determined to call in another judge in the court of original jurisdiction he cannot subsequently change the venue to another court: State ex rel. Giles v. French, 102 Wash. 273, 172 Pac. 1156.

Prejudice against officer, stockholder, or employee as ground for change of venue on application of corporation. 63 A.L.R. 1015.

§ 209-2.* **Affidavit of prejudice.** Any party to or any attorney appearing in any action or proceeding in a superior court, may establish such prejudice by motion, supported by affidavit that the judge before whom the action is pending is prejudiced against such party or attorney, so that such party or attorney cannot, or be-

believes that he cannot, have a fair and impartial trial before such judge: Provided, that such motion and affidavit is filed and called to the attention of the judge before he shall have made any ruling whatsoever in the case, either on the motion of the party making the affidavit, or on the motion of any other party to the action, of the hearing of which the party making the affidavit has been given notice, and before the judge presiding has made any order or ruling involving discretion, but the arrangement of the calendar, the setting of an action, motion or proceeding down for hearing or trial, the arraignment of the accused in a criminal action or the fixing of bail, shall not be construed as a ruling or order involving discretion within the meaning of this proviso: And provided, further, that no party or attorney shall be permitted to make more than one such application in any action or proceeding under this act. [L. '27, p. 129, § 2; L. '11, p. 617, § 2.]

Cited in 77 Wash. 632, 634, 138 Pac. 291; 83 Wash. 89, 145 Pac. 66; 85 Wash. 664, 149 Pac. 16; 87 Wash. 605, 152 Pac. 1; 88 Wash. 670, 671, 153 Pac. 1078; 95 Wash. 647, 164 Pac. 198; 96 Wash. 36, 164 Pac. 595; 106 Wash. 509, 510, 180 Pac. 481; 108 Wash. 637, 185 Pac. 628; 111 Wash. 283, 190 Pac. 321; 122 Wash. 410, 210 Pac. 675; 125 Wash. 56, 215 Pac. 44; 125 Wash. 295, 296, 298, 216 Pac. 17, 18; 154 Wash. 320, 282 Pac. 70.

The last clause must be construed to apply only when the accused expressly consents to be tried in another county: State ex rel. Howard v. Su-

perior Court, 88 Wash. 344, 153 Pac. 7. See, also, State v. Reese, 112 Wash. 507, 192 Pac. 934.

This section permits of an affidavit upon information and belief: State ex rel. Dunham v. Superior Court, 106 Wash. 507, 180 Pac. 481.

Where a motion for change of venue, granted without notice, was vacated, a second motion thereupon filed is not an abandonment of the first, within the statute prohibiting more than one application; since, if well taken, the first should have been granted, and if not well taken, it was abortive and of no legal effect: Id.

§ 210. To what venue changed—Only one allowed. If a motion for a change of the place of trial be allowed, the change shall be made to the county where the action ought to have been commenced, if it be for the cause mentioned in subdivision 1 of section 209, and in other cases to the most convenient county where the cause alleged does not exist. Neither party shall be entitled to more than one change of the place of trial, except for causes not in existence when the first change was allowed. [L. '69, p. 14, § 53; L. '77, p. 12, § 53; Cd. '81, § 52; 2 H. C., § 164.]

Cited in 64 Wash. 512, 513, 117 Pac. 265; 65 Wash. 314, 315, 118 Pac. 40; 65 Wash. 630, 631, 118 Pac. 830; 69 Wash. 262, 124 Pac. 688; 70 Wash. 362, 126 Pac. 926; 71 Wash. 61, 127 Pac. 594; 82 Wash. 358, 144 Pac. 291.

Constitutional provisions—Jury of vicinage: See Remington's Digest, Crim. Law, § 29-2; State ex rel. O'Phelan v. Superior Court, 88 Wash. 669, 153 Pac. 1078.

CARNEY BADLEY SPELLMAN

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